(24,848)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 196.

THE SALT LAKE INVESTMENT COMPANY, PLAINTIFF IN ERROR,

vs.

OREGON SHORT LINE RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 7, 1916.

1 In the District Court of the Third Judicial District in and for the County of Salt Lake, State of Utah.

Case Number 15612.

THE SALT LAKE INVESTMENT COMPANY, a Corporation, Plaintiff,
v.
OREGON SHORT LINE RAILROAD COMPANY, a Corporation, Defendant.

Hon. Geo. G. Armstrong, Judge.

TRANSCRIPT ON APPEAL.

Appearances:

Messrs. M. E. Wilson and E. A. Walton, Attorneys for Plaintiff and Respondent.

Messrs. P. L. Williams, George H. Smith, and H. B. Thompson, Attorneys for Defendant and Appellant.

Files transmitted to the Supreme Court of State of Utah, this 25th day of February, A. D. 1914.

[SEAL.] L. P. PALMER, *Clerk.*

Filed March 10, 1914. H. W. Griffith, Clerk Supreme Court, Utah.

2 In the District Court of the Third Judicial District in and for Salt Lake County, Utah.

Amended Complaint.

And now comes the plaintiff and, by leave of court first had and obtained, files this as its amended complaint in the above entitled action, and for cause of action against the defendant complains and alleges:

1.

That plaintiff is, and at all times hereinafter mentioned was, a corporation duly organized and existing under the laws of the State of Utah.

2.

That defendant is, and at all times hereinafter mentioned was, a corporation duly organized and existing under the laws of the State of Utah.

3.

That plaintiff at all times hereinafter mentioned was the owner and entitled to the possession of that certain tract of land situated

in Salt Lake County, State of Utah, more particularly described as follows, to-wit

3 Beginning at a point on meander line number six (6) one hundred and forty-five (145) feet north 30° east of the intersection of courses five (5) and six (6) of the meander lines of Hot Springs Lake in Section Twenty-three (23), Township one (1) North of range one (1) west, Salt Lake Meridian;

Running thence southerly along the east boundary line of the D. & R. G. W. Railway's right-of-way, and forty (40) feet east and parallel with the center line of the said Railway's track as now constructed three hundred and seventy-five (375) feet to said meander line five (5); thence southeasterly on said meander line number five (5) to the west boundary line of the O. S. L. R. R. right-of-way as recorded in Book "D" of Deeds, page 595 of the records of Salt Lake County; thence northerly along the west boundary line of said right-of-way of said O. S. L. R. R. and fifty (50) feet west and parallel with the center line of said O. S. L. R. R. track to course number six (6) of the meander lines of Hot Springs Lake; thence southwesterly on said meander line number six (6) to point of beginning. Being a part of Lot two (2) of Section twenty-three (23) Township one (1) North of range one (1) West of Salt Lake Meridian, and containing one (1) acre of land, more or less.

4.

That prior to and up to the time of the commission of the acts, hereinafter complained of, by the defendant, there existed and was situated upon said land of the plaintiff above described a certain flowing spring known as "Hobo Spring," which spring constantly discharged hot mineral water of great value, which water flowed out upon the aforesaid land of the plaintiff; that the said lands with said spring situated thereon constantly flowing, as aforesaid, was of the value of twenty thousand dollars.

5.

That on or about the first day of April, A. D. 1906, the defendant, without right or authority of law, and without instituting any eminent domain or condemnation proceedings, and without the

4 consent of the plaintiff herein, entered upon said land above described and occupied the same, and from time to time proceeded to and did dump great quantities of earth, rock, gravel and other substances upon said land, and constructed upon certain portions of the same its railroad tracks, and proceeded to and did occupy the said land, and still does occupy the same for the purpose of operating its railroad over and upon said land. That in dumping said earth, rock, gravel and other substances upon said land, and in constructing said railroad tracks thereon, and in continuing to occupy the same, as aforesaid, the said defendant has absolutely destroyed and prevented the flow of the water from said spring and has absolutely destroyed the existence of said spring in such manner as to cause the waters naturally arising and flowing out of said spring to

seek other channels and not to arise upon the aforesaid lands of the plaintiff hereinbefore described; and that in its occupation of said land as aforesaid the defendant has thereby wrongfully appropriated said land to its own use and benefit. And that by reason of the matters and things herein stated and said worngs done and committed by the said defendant, plaintiff has been damaged in the sum of $20,000.00.

Wherefore, plaintiff prays judgment against the defendant for the sum of twenty thousand dollars, together with the costs of this suit, and for such other and further relief as justice may require.

M. E. WILSON,
Attorney for Plaintiff.

Filed Dec. 10, 1912. Margaret Jane Witcher, Clerk Dis't. Court of Salt Lake County, Utah. J. Ramussen, Deputy Clerk.

5 In the District Court of the Third Judicial District of the State of Utah, in and for Salt Lake County.

Answer to Amended Complaint, and Cross-complaint.

Comes now the defendant, and for answer to the amended complaint filed herein, says:

1. It admits that the plaintiff now is, and at all the times mentioned in said complaint was, a corporation duly organized and existing under the laws of the State of Utah.

2. It admits that defendant now is, and at all the times mentioned in said complaint was, a corporation duly organized and existing under the laws of the State of Utah.

3. It admits that prior to the first day of April, 1906, this defendant entered upon and took possession of all of the land described in planitiff's said amended complaint, as nearly as said land can be located or ascertained from the description contained in said amended complaint, which said premises are enclosed in olive or green lines on the print hereto attached, marked Exhibit "A" and made a part hereof, and that it has ever since had the continuous and exclusive occupation and possession of said premises, and has, at all of said times, occupied the same for the purpose of operating its railroad over and upon said land.

6 Admits that such entry was without the consent of the plaintiff herein, and without the institution of eminent domain or condemnation proceedings.

4. Further answering said amended complaint, this defendant denies each and every allegation therein contained, not hereinbefore expressly admitted or denied.

5. Further answering said amended complaint, and as a separate and additional defense thereto, defendant alleges that said alleged cause of action is barred by the provisions of Section 2883 of the Compiled Laws of Utah 1907.

6. Further answering said amended complaint, and as a separate

and additional defense thereto, defendant alleges that said alleged cause of action is barred by the provisions of Section 2877, subdivision 2 thereof, Compiled Laws of Utah 1907.

7. For a further answer and defense to said amended complaint, and by way of cross-complaint, this defendant alleges that on the 15th day of December, 1870, said lot 2 of Section 23 Township 1 North, Range 1 West, Salt Lake Meridian, in the district of lands subject to sale at Salt Lake City, Utah, was public land of the United States; that prior to that time, to-wit; on or about the first day of January, 1870, the Utah Central Railroad Company, a corporation, then existing and created under the laws of the legislative assembly of the territory of Utah, had constructed and completed its line of railroad extending from Ogden City, Weber County, Utah, to Salt Lake, Salt Lake County, Utah, at a point near the intersection of Third West Street and South Temple Street, in said Salt Lake City, and that said line was then so constructed over and across said Lot
2 of Section 23, the original location thereof being shown
7 by red line and marked "original main line and center line of
R. of W." on the map hereto attached, marked exhibit "A" and made a part hereof; that, on said 15th day of December, 1870, an Act of Congress of the United States was duly approved and then became a law whereby, and by the terms of which, the United States granted a right of way to the said the Utah Central Railroad Company for its railroad and telegraph line from a point at or near said Ogden City to said Salt Lake City, in the State of Utah. Said right-of-way was granted by said Act to said railroad company to the extent of two hundred (200) feet in width on each side of said railroad where it might pass through the public domain. That this defendant is the successor of the said grantee in said Act, the said Utah Central Railroad Company, by virtue of mesne conveyances and articles of consolidation entered into in pursuance of the laws of the territory of Utah and the State of Utah, and is now the owner, in the possession and entitled to the possession of all that portion of the said Lot 2 of Section 23, Township 1 North, Range 1 West Salt Lake Meridian, being a strip of land four hundred feet wide, extending two hundred feet on each side of the line of said Utah Central Railroad as originally located and constructed, over and across the said tract of land. The said land so granted to the said Utah Central Railroad Company and now owned and possessed by this defendant is particularly bounded and described as follows, to-wit:

"An irregular tract of land lying in Lot 2, Section 23, Township 1 North, Range 1 West of Salt Lake Meridian, in Salt Lake County, Utah, being bounded and described as follows:

Beginning at a point in Meander Line Number six (6) of Hot Springs Lake Survey, said point being North 30° 00′ East one hundred forty-five (145) feet, from the intersection of Meander Lines Numbers five (5) and six (6); thence South 0° 52′ West three hundred seventy-five (375) feet to a point in Meander Line Number five (5) and South 15° 00′ East two hundred fifty-eight

MAPS

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(258) feet more or less from the intersection of said Meander
8 Lines Numbers five (5) and six (6); thence South 15° 00′ East along said Meander Line Number five (5) to a point fifty (50) feet westerly measured at right angles from the center line of the original main track of the Oregon Short Line Railroad; thence northerly and fifty (50) feet Westerly from and parallel to the said center line of track to a point in Meander Line Number six (6); thence South 30° 00′ West along said Meander line to the point of beginning."

That neither the plaintiff, its ancestor, grantor nor predecessor was seized or possessed of the premises herein described, or any portion thereof, within seven years before the commencement of this action.

Wherefore, This defendant prays that the said plaintiff take nothing by its said amended complaint, and also prays that the decree of this court quieting title of this defendant in and to said premises as against the plaintiff and all persons claiming under it, and that the said defendant have such other and further relief in the premises as may be equitable and just.

P. L. WILLIAMS,
GEO. H. SMITH,
H. B. THOMPSON,
Attorneys for Defendant.

Filed Dec. 23, 1912. Margaret Jane Witcher, Clerk Dist. Court, Salt Lake County, Utah, by J. Rasmussen, Deputy.

(Here follows map marked p. 9.)

10 In the District Court of the Third Judicial District in and for Salt Lake County, Utah.

Reply.

And now comes the plaintiff and replying to the answer and cross-complaint of the defendant in the above entitled cause, denies each and every allegation contained in paragraphs 5, 6 and 7 of said answer.

Wherefore, said plaintiff prays judgment according to the prayer of its complaint.

M. E. WILSON,
Attorney for Plaintiff.

11 In the District Court of the Third Judicial District in and for Salt Lake County, Utah.

Plaintiff's Requests for Instructions.

I.

You are instructed that the issue in this case is as to compensation, if any, that the defendant should pay to the plaintiff for the tract of land described in the pleadings. And in determining such issue the jury is authorized to allow to the plaintiff the market value of said tract of land at the time it was appropriated to its use by the defendant; and in determining that market value the jury is authorized to take into consideration the undisputed fact that at the time the land was taken by the defendant company there was situated upon said land a hot spring constantly flowing, and the fair market value of the acre of land described in the pleadings with such spring flowing thereon is the amount that the plaintiff will be entitled to recover from the defendant.

Given.

ARMSTRONG, *Judge.*

Filed Sep. 12, 1913. L. P. Palmer, Clerk Dist. Court Salt Lake County, Utah, by Jean L. May, Deputy Clerk.

12 In the District Court of the Third Judicial District in and for the County of Salt Lake, State of Utah.

Defendant's Requested Instructions.

Defendant's Request No. 1.

You are instructed to render a verdict in favor of the defendant, no cause of action, for the reason that plaintiff has failed to prove

that it was the owner of the premises at the time of the wrongs complained of and is not entitled to damages therefor.

Refused.

ARMSTRONG, *Judge.*

Filed Sept. 12, 1913. L. P. Palmer, Clerk Dist. Court Salt Lake County, Utah, by Jean L. May, Deputy.

13 In the District Court of the Third Judicial District of the State of Utah, County of Salt Lake.

SALT LAKE INVESTMENT COMPANY, Plaintiff,
vs.
OREGON SHORT LINE RAILROAD COMPANY, Defendant.

Judgment on Verdict.

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of eight persons was regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, and, being called, answered to their names, and say they find a verdict for the plaintiff as follows:

"We, the jurors impaneled in the above case, find the issues for the plaintiff and against the defendant and assess its damage in the sum of ($4,000.00) Four Thousand dollars.

Dated Sept. 12, 1913.

J. L. WEILER, *Foreman.*"

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said plaintiff have and recover from said defendant the sum of $4,000.00 Dollars with interest thereon at the rate of eight per cent. per annum from the date hereof till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of — Dollars.

Judgment rendered September 12th A. D. 1913.

14 STATE OF UTAH,
County of Salt Lake, ss:

I, L. P. Palmer, Clerk of the Third Judicial District Court of the State of Utah, in and for the County of Salt Lake, do hereby certify that the foregoing is a full, true and correct copy of the Judgment entered in the above entitled action.

Witness my hand and the Seal of said Court, at Salt Lake City, this 12th day of September A. D. 1913.

[SEAL.]

L. P. PALMER, *Clerk.*
By OLIVIA M. BURT,
Deputy Clerk.

[Endorsed:] No. 15612. District Court, Third Judicial District, County of Salt Lake, State of Utah. Judgment on Verdict. Filed Sept. 12 A. D. 1913. L. P. Palmer, Clerk, by Olivia M. Burt, Deputy Clerk.

15 In the District Court in and for Salt Lake County, State of Utah.

No. 15612.

Be it remembered that on Monday the 8th day of September, A. D. 1913, at two o'clock P. M. of said day the above entitled cause came on for trial before Hon. George G. Armstrong, one of the judges of said court, sitting with a jury, both sides appearing by counsel as follows: Messrs. M. E. Wilson and E. A. Walton for the plaintiff and Messrs. Williams, Smith and Thompson by H. B. Thompson, Esq., for the defendant.

And announcing themselves ready for trial the following proceedings were had:

Mr. Wilson: I would like to have entered the name of Mr. E. A. Walton as counsel for plaintiff in addition to myself.

The Court: It may be entered.

A jury of eight good and lawful men was called, examined, chosen, and sworn herein.

Thereupon, Mr. Wilson made the opening statement of the plaintiff's case to the jury.

Thereupon, Mr. Thompson made the opening statement of the defendant's case to the jury.

Thereupon, the plaintiff, to sustain the issues upon its part, gave in evidence the following, to-wit:

16 Mr. Walton: Mark this as an exhibit. (abstract marked for identification Exhibit A and declaratory statement for cases where the land is not subject to private entry marked for identification Exhibit B) Mr. Thompson will you admit that Gustave Backman who purports to certify Exhibit—plaintiff's Exhibit A was at the time and is a licensed abstractor within the purview of Section 629 X Revised Statutes.

Mr. Thompson: When, in March 1911?

Mr. Walton: Yes.

Mr. Thompson: If you say he was; I don't know whether he was or not, if you say he was I will take your word.

Mr. Walton: I will say he was.

Mr. Thompson: It is so admitted then.

Mr. Walton: The plaintiff offers in evidence Exhibit A being an abstract of title and certified by G. H. Backman licensed abstractor on the 15th day of March 1911 at 8:55 A. M.

Mr. Thompson: We object to the offer; for what purpose is it offered Mr. Walton?

Mr. Walton: For the purpose of showing title in the plaintiff to the land described in the complaint.

Mr. Thompson: At what time?

Mr. Walton: At all the times mentioned in the complaint and from December 1st 1904 the date of our first title.

Mr. Thompson: Which item?

Mr. Walton: No. 19.

Mr. Thompson: That is you claim that you have title by virtue of the tax certificate of the County Treasurer of Salt Lake County given at the Salt Lake Investment Company being entry No. 19?

Mr. Walton: That is part of the chain.

17 Mr. Thompson: That is upon which you claim your title vested in the Salt Lake Investment Company and was vested in 1906, is that correct?

Mr. Walton: At least as soon as that time.

Mr. Thompson: Well by what else in the abstract do you claim the title was vested in the Salt Lake Investment Company in 1906?

Mr. Walton: Well all of the items that refer to conveyances to the Salt Lake Investment Company.

Mr. Thompson: That is no item subsequent to 1906, to you mean?

Mr. Walton: Yes, those too, all of it.

Mr. Thompson: Yes; if the court please we object to the offer upon the ground that so far as concerns item No. 1 from the United States of America to Malcolm Macduff that the land was not subject to entry under the land laws of the United States and that that patent was void as against the railroad company to whom your Honor judicially knows the grant was subsequently made, that when you leave that out that it was void against the railroad company in any event up to 1877, when an act was passed confirming those titles and while such an act might conform those titles of course it could not operate to divest title which had vested on the land while it was public land. We object further to the balance of the abstract as all of the items predicated on that patent and all things in connection therewith. We further object to the abstract upon the ground that it contains no statement of facts or matters to be certified by an abstractor in the regular course of business but contains conclusions and expressions of opinion as in item 1 a quotation from records of the United States Land office which I believe this abstractor

18 is not competent to give under the statutes of Utah or certify after that quotation; the abstractor says "Which according to statements of the attaches at the land office means", and so on. We object to all of that as prosecuting hearsay. We further object to the abstract as proof of title in the plaintiff at the time alleged in its complaint, objecting to that and to these other entries as incompetent, irrelevant and immaterial for the reason that, as your Honor well appreciates, the issuance of a certificate of sale under which title can not vest for four years does not convey title and did not convey title to the plaintiff in the present case, and that whatever damages accrued in May 1906 are damages of the person against whom the property was assessed, it appearing from the abstract that on December 21st 1904 a tax sale certificate was issued by the County Treasurer of Salt Lake County to the Salt Lake Investment Company of certain property therein described, and it not appearing

from the abstract that any title subsequently vested in the plaintiff company at any time at issue. That really raises considerable of a question possible. I object for the further reason also at this time to any proof upon the ground that the evidence which is now being offered is tendered in support of a pleading which is substantially the same as that to which your Honor upon demurrer sustained the pleading of statute of limitations. I think that that raises a question which if we go into it will take more than an hour to discuss.

Mr. Walton: I think I could, inasmuch as all these matters, such matters as these and one or two others address themselves substantially if not wholly to the court, that the legal question might be well raised and argued, and of course we have matters in connection with the abstract, brief documentary evidence, and probably
19 the case will take such shape that every legal question in the case could be well determined without taking any substantial oral evidence, and if you will let me proceed and let him reserve the ruling for the moment, for the time being——

Mr. Thompson: I don't wish to place myself in the position Mr. Walton of waiving anything, but let's say as far as I am concerned it is agreeable to me that that be done, without waiving anything.

Mr. Walton: I said reserve, just reserve for a moment.

The Court: I take it it is a question excluding the jury Mr. Walton.

Mr. Walton: Yes, but I suppose they ought to be here to hear a few words of oral evidence.

The Court: All right go ahead.

Mr. Walton: I will see if I can dictate a stipulation as to Exhibit B.

Mr. Thompson: Make your offer may I ask.

Mr. Walton: We offer in evidence Exhibit B. purporting to be a true copy certified by E. D. R. Thompson, register, of declaratory statement of Maccolm Macduff filed in United States Land Office July 21st 1869. May it be admitted Mr. Thompson that Exhibit B is a true copy of said declaratory statement and that it was so lodged and filed in the land office at Salt Lake City, July 21st 1869?

Mr. Thompson: Isn't it so certified by the register and receiver?

Mr. Walton: Certified the date of filing only but you and I examined.

Mr. Thompson: We examined Mr. Walton and found that there was an entry of Malcolm Macduff I think on the 21st day of July 1869, but whether it was this in substance or effect or what it was I don't know. Now so far as I know from that examination
20 of the record I will admit or let us say this much, I guess we can admit that it was a pre-empt declaratory statement, we will agree to that will we not.

Mr. Walton: Yes, but I thought that you had made the examination with myself so as to——

Mr. Thompson: Well could you say that that was the thing that was filed? Now if you could say it, I could say it, but I don't think you could, what do you say?

M. Walton: Well that is what they told me.

Mr. Thompson: I will re-dictate to be sure that I get it all in. Well could you say that that was the thing that was filed? Now if you could say it I could say it but I don't think you could, what do you say?

Mr. Walton: Well that is what they told me.

Mr. Thompson: Well if you think after all, after their telling you themselves that they compared or investigated or knew—I don't know—I am willing to stipulate anything in fairness that we think we can feel our way sure of.

Mr. Walton: I will say I am surprised at not being able to agree on that and I will have to call a party from the land office.

Mr. Thompson: If we can make it in any way outside I don't wish to put you to that trouble. Do you want to assume for the purpose of presenting the matter, but not without admission but for the purpose of presenting the matter at least, do you want to assume that that was filed and that it was filed at any particular time, and then I can make my objections.

Mr. Walton: If you will make a stipulation provisionally that you may have leave to withdraw it tomorrow morning for an
21 examination, if you are willing to go over there and examine and verify it.

Mr. Thompson: Well now I will tell you it is only a matter of time if we can do it going over tonight and in the morning but you see I am doing preparation and I don't hardly think I ought in courtesy to agree to go down and satisfy myself because if I did it briefly and quickly maybe I could not do it so I wouldn't like to do it, so bring it over.

Mr. Walton: Very well.

Mr. Thompson: And do you want to stipulate conditionally for the purpose of submission?

Mr. Walton: No, I will put in the proof, I will put in proof. Now while I am about it I will ask you if you will stipulate if you can that the proper authorities of Salt Lake City pursuant to the acts of Congress in such cases made and provided entered and purchased on November 21st, 1871, Salt Lake City Townsite.

Mr. Thompson: Object to it as being immaterial.

Mr. Walton: Certainly.

Mr. Thompson: And irrelevant and incompetent, I stipulate—well, cut out incompetent, immaterial and irrelevant, I do not stipulate and agree that on that date, if you say that is the date, the Mayor of Salt Lake made an entry for the citizens in Salt Lake pursuant to statute.

Mr. Walton: And——

Mr. Thompson: And that it did not embrace the land in question.

Mr. Walton: And that the entry consisted of five thousand seven hundred and thirty and forty five one hundredths acres.

Mr. Thompson: Have you verified that?

Mr. Walton: Yes.

Mr. Thompson: I stipulate that that is so then.

22 Mr. Walton: And that the same was in a compact body and all continuous?

Mr. Thompson: Yes—oh did you say that that is so?

Mr. Walton: Certainly, I have examined it.

Mr. Thompson: All right.

Mr. Walton: Now will you admit reserving any objection that you want or making any objection that the land in controversy here was——

Mr. Thompson: Just a moment before you ask that. I object that the offer however is incompetent to prove any title or foundation of title in the plaintiff.

Mr. Walton: That is as to your other stipulation.

Mr. Thompson: To what you have just added to it with reference to the Mayor's entry.

Mr. Walton: Yes; now will you admit that the land in controversy has never been actually settled upon, inhabited, improved and used for business and municipal purposes?

Mr. Thompson: Yes. This is subject to this isn't it Mr. Walton that if I should find the contrary to be the fact——

Mr. Walton: You may put in the proof of it, yes.

Mr. Thompson: Yes.

Mr. Walton: And now also that it wasn't settled upon or used for municipal purposes nor devoted to any public use of the town of Salt Lake City?

Mr. Thompson: Yes, but in doing so let me ask you what you are reading from. Those statements Mr. Walton apply only to times subsequent to 1877 and all of those admissions which I have just made apply to a time subsequent to 1877.

Mr. Walton: Then you don't want to admit that it never was as a matter of fact.

Mr. Thompson: Since you are directing your proof to the
23 statute of 1877 no, I will confine my admission to 1877.

Mr. Walton: All right.

Mr. Thompson: But up to that time it had not been; I think that will satisfy you, won't it? No, I will withdraw that, but up to that time. I will stipulate anything with reference to the fact or condition in 1877. Now you haven't offered this have you, so I don't need to make any objection to it?

Mr. Walton: No you didn't stipulate that that was so filed.

Mr. Thompson: So it has not been offered?

Mr. Walton: No, Mr. Macduff take the stand.

Mr. Thompson: I assume of course that this is offered at the discretion of the court and not pursuant to stipulation, Mr. Macduff now.

Mr. Walton: What is that?

Mr. Thompson: That is you and I sort of agreed that notwithstanding those objections made that you might put on some further testimony before the matter was considered. I wished to leave it in the hands of the court and not rest on the stipulation.

Mr. Walton: Certainly, I would not offer to read anything to the jury you know of any consequence.

24 JOHN WILLIAM MACDUFF, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Walton:

Q. What is your full name?
A. John Macduff, John William Macduff.
Q. How old are you?
A. 43 years past.
Q. What was your father's name?
A. Maccolm Macduff.
Q. Where did he reside in his lifetime?
A. Near the Hot Springs.
Q. Are you acquainted with the premises known as Lot 2 in Section 23 North 1 West?
A. Yes.
Q. Let's see, how old did you say you were?
A. 43 past.
Q. 43, and how long have you lived—where do you live now?
A. I live in the same place as my father lived.
Q. Well out near the Hot Springs?
A. Near Beck's Hot Springs, 2000 North Beck Street it is known as.
Q. How long have you lived there?
A. All my life, that is I was born there and I live there now.
Q. And is it near Lot 2?
A. Yes.
Q. And in what direction from Lot 2 do you live?
A. Well I think it is north of east.
Q. But a short distance?
A. Yes, it is not far; Lot 2 is in the same quarter section.
Q. And do you know or have you known of the location, approximate location and existence of a certain Hot Springs called the Hobo Hot Springs?
A. Yes.
25 Q. And how long or during what period of time in your life have you known of that springs?
A. Oh ever since I can remember, until the Short Line covered it up.

Mr. Thompson: Just a moment I move to strike the portion consisting of the words "until the Short Line covered it up" as not responsive.

The Court: It is overruled.

Q. About what date approximately, I don't care for the exact date.
A. I could not tell you the exact date, I suppose it was along about 1900, along the first — year in 1900, I should think somewhere along there; it seems to me it is anywhere from eight to ten years ago.
Q. And do you know whether that was in Lot 2 of the section?
A. I could swear it was, I know exactly where this spring was.

Q. And during those years that you knew it you may state whether it had that name?

A. Oh yes, yes.

Q. Generally known as the Hobo Springs?

A. As the Hobo Springs.

Q. Has there ever been any town out there, I mean any business, municipal business or purposes out there?

A. No.

Q. And what was the character of the country there for a half a mile around as to whether it was used for town purposes or farming or something of that kind?

Mr. Thompson: At what time please?

Q. All the time that you have known it.

Mr. Thompson: Just a moment I object to evidence of conditions at any time prior to 1877 or at all as being irrelevant, incompetent and immaterial. The question before the court is whether a valid homestead entry was made in 1870 or 1871, as you will ob-
26 serve upon reference to the abstract.

Mr. Wilson: It would be material anyhow to show the condition of this land; that is an issue of damages; it is admissible at this time.

Mr. Thompson: Not prior to 1877.

Mr. Wilson: Admissions all the time are admissible.

The Court: He may answer.

Mr. Thompson: Save one exception.

The Witness: Read the question please.

(Question read.)

A. Well on the east side of the road it was planted in lucerne. Of course immediately surrounding of that spring was salt grass and sloughish land.

Q. Was there any, within a half a mile of the spring——

A. Any what?

Q. I say within a half mile of the spring was there any, had there ever been any business house, store or shops or anything of that kind?

A. No.

Mr. Thompson: It is understood I take it that I have a standing objection to this line of testimony with respect to anything that happened prior to 1877.

Mr. Walton: Yes.

Mr. Thompson: Yes.

Q. You may state whether within half a mile of the Hobo Spring up to 1877 if you remember, there were any persons living there upon small tracts persons who did business in the city?

Mr. Thompson: Object to that as irrelevant, incompetent and immaterial.

By the Court: He may anewer.

Mr. Thompson: Save exception.

A. Well I can't remember much prior to 1877, I was only seven years old; there hasn't been any since I can remember.

27 Mr. Walton: I think that is all for the present.

(Inaudible discussion).

Mr. Wilson: It is understood that I may examine the witness relative to the general subject. He is a busy man and does not want to come back again if he doesn't have to, it will only take a minute.

Mr. Thompson: It occurs to me that the rule, if you are going further, that the rule ought to apply that the same counsel who has examined him should continue.

Mr. Walton: That is a matter of discretion with the court, because I have not prepared on any question other than the title I will have to be prompted and it will take me three times longer to examine him on the question of damages; it is a matter for the court.

Mr. Thompson: Let me ask you this to expedite the thing all around then, do you stipulate then that the land in question *q*as at all the time within the corporate limits of Salt Lake and fixed by the Terri*rot*ial Legislature of Utah?

Mr. Walton: Yes I have examined that and it is true.

Mr. Thompson: That is prior to 18 and 70 and prior to 18 and 69?

Mr. Walton: Since 1860.

Mr. Thompson: All right, then proceed to examine him, Mr. Wilson rather.

Direct examination continued by Mr. Walton:

Q. Mr. Macduff I understand you are the son of Malcolm Macduff are you?

A. Yes sir.

Q. And you are familiar with the spring known as the Hobo Spring?

A. I was, yes.

28 Q. And have been familiar with it ever since you can remember, you having been born in 1870?

A. Yes sir.

Q. Do you kown where the spring got its name?

A. I didn't hear you.

Q. Do you know where the spring got its name?

A. Yes.

Q. Just tell the jury how the spring happened to be named.

A. Well it was kind of secluded from the road by a small mound and the hobos dug it out around the spring and placed some ties there and they used to go and bathe, that's how it got the name.

Q. And thereby it got the name of Hobo Spring?

A. Yes.

Q. Did you ever bathe in it yourself?

A. Yes, many times.

Q. When you were a boy?

A. Yes.

Q. And did you observe the flow of the water or volume of it?

A. Oh yes, I have.
Q. Can you describe it to the jury in a general way about how that water would flow out of that spring?

Mr. Thompson: Out when?
Mr. Wilson: Oh at the time he observed it.
Mr. Thompson: Of course that is very indefinite but let it go, I assume he will specify.

A. Oh it run out of the west side of the pond about two feet I think wide and maybe a foot deep.
Q. And how long did your observations continue with regard to the spring Mr.——
A. Oh I knew it until it was—the Short Line filled it in.
Q. Until it was covered up by someone?
A. Yes.

Mr. Thompson: Just a moment, don't lead the witness.
Mr. Walton: He is expressing, not leading.

29 Q. How frequent was your observation?
A. Oh during duck season, every night.
Q. And what was the character of that water Mr. — with reference to it being hot of cold?
A. It was a hot spring, a hot sulphur spring.
Q. About, do you know the temperature of it?

Mr. Thompson: I move to strike the words "sulphur" as a conclusion of the witness.
The Witness: Well I know.
Mr. Thompson: And not responsive.
The Court: Overruled.
Mr. Thompson: Save exception.

Q. Do you know the temperature of it Mr. Mcduff?
A. Oh I could judge but not definitely.
Q. About what would you say it was?
A. A hundred and ten I think maybe fifteen.
Q. Did you ever compare it with Beck's hot springs?
A. Well that is how I am saying it now from the pools we use now, I should think it would be a hundred and ten or fifteen.
Q. Was it hotter than the human body?
A. Well it felt hot when you first got in, you could stand it.
Q. You could bathe in it without cooling?
A. Yes, it wouldn't scald you.
Q. Did you form an opinion as to the value of that spring Mr.—from your observation of it and your knowledge of values generally, just answer that question yes or no?
A. Yes in a certain way.
Q. Assuming that it was situated on approximately an acre or an acre and a half of ground what would you say would be the value of that spring so situated?

Mr. Thompson: Wait, object to the question as irrelevant, incom-

petent and immaterial, the proper foundation not having been laid.

Mr. Wilson: I will lay some foundation your honor and withdraw the question for the present.

30 Q. Mr. Macduff I take it that—or you may state whether or not you have had any experience in dealing in real estate in this community buying and selling, observing the buying and selling of real estate?

A. Oh yes, I have owned real estate a long time.

Q. Let's see, what is your business Mr. Macduff?

A. I have no business now.

Q. What business have you been engaged in?

A. Lime business.

Q. And I will ask you whether you have become familiar with the selling—the buying and selling of lands whereon springs were situated, that is not necessarily engaged in it yourself but whether you have observed the buying and selling of it and heard of it?

Mr. Thompson: Just a moment, I object to that as irrelevant, incompetent and immaterial unless they are shown to be springs of the same or similar character at approximately the time the value of this spring is sought to be fixed.

The Court: He may answer the question.

Mr. Thompson: Save exception.

A. Yes.

Q. And from your observation in the sales that have been made in and around Salt Lake City and in the dealing in real estate have you formed an opinion as to the value of this land assuming it to contain about an acre or an acre and a half of ground with this spring situated on it in say 1906 or '7, I just ask you whether you have formed an opinion as to the value, just answer that yes or no.

A. Yes.

Q. Now I will ask you to state what that opinion is as to the value of that land.

Mr. Thompson: Just a moment I object to the question as irrelevant, incompetent and immaterial, and for the reason the proper foundation has not been laid.

31 The Court: He may answer.

Mr. Thompson: Save exception.

A. Read the question.

(Question read.)

Q. Including the spring flowing thereon.

Mr. Thompson: Same objection, and the ruling being the same I assume——

The Court: Yes.

Mr. Thompson: The same exception.

A. Of course when the spring was flowing the land was valuable but after the spring was closed why the land itself is now of very little value.

Mr. Thompson: I move to strike the answer as not responsive.
Mr. Wilson: We resist the motion your Honor.
The Court: Overruled.
Mr. Thompson: Save exception.

Q. I will ask you to state what the value of the land was when the spring was flowing, your opinion, your best estimation of it.

Mr. Thompson: I object to that as irrelevant, incompetent and immaterial and for the reason that the wit*t*ess has not qualified as an expert and no proper foundation land.
The Court: He may answer.
Mr. Thompson: Save exception.

A. Well I have often stated that if that spring was on my land——
Q. Just answer the question.
The Court: Just answer the question.
A. Read the question please. (Read.) Well I should think it would be worth anywhere from fifteen to twenty thousand dollars.
A. When you observed the flow of that water prior to the time of its having been closed up and choked up did you observe
32 anything with regard to the rapidity, whether the flow was rapid, whether it came out of the ground rapidly or slowly?
A. It was a big flow of water that came up and then this hole the hobos had made and it ran out quite rapidly at the rate I should think of three or four hundred gallons a minute.

Mr. Wilson: Cross examine.

33 GEORGE E. WOOLLEY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Walton:

Q. What is your name?
A. George E. Woolley.
Q. And what is your official position with the land office?
A. I am chief clerk of the land office at Salt Lake City, United States Land office.
Q. That is U. S. Land office?
A. U. S. Land office.
Q. Are you familiar with the records of that office?
34 A. Yes, sir.
Q. How long have you been such chief clerk?
A. I have been there since 1899, not as chief clerk but in the office.
A. In the office?
A. Yes sir.
Q. Since 1899?
A. Yes sir.
Q. You have been subpœnaed as a witness to produce certain books and records of that office?
A. Yes sir.
Q. And you have produced such books as were indicated upon the subpœna*e*?

A. Yes sir.
Q. I call your attention to pre-emption entry No. 1932, declaratory statement, have you such a paper?
A. Yes sir.
Q. Is that one of the files of the United States Land office of Salt Lake City?
A. Yes sir.
Q. Will you kindly produce it? This paper you produce is the declaratory statement No. 1932, Malcolm Macduff.
A. Yes sir.
Q. And endorsed "Declaratory statement No. 1932 Malcolm Macduff."
A. Yes sir.
Q. And I will ask you if that comes from the usual repository of papers of that kind in your office?
A. Yes sir.
Q. Will you look at Exhibit B. and kindly compare them and see if they are copies. Have you compared the original *with* you have produced, with Exhibit B?
A. Yes sir.
Q. Are they identical?
A. They seem to me to be identical, placing "T" in place of "S" Utah territory in place of U. S.
A. Have you the register of—I don't know what the name is—some register of the filing of such——
35 A. Declaratory statement?
Q. Declaratory statements.
A. Yes sir.
Q. Is that the book?
A. Yes sir.
Q. You have produced it?
A. Yes sir.
Q. The original from the land office?
A. The original from the land office.
Q. And have you the entry No. 1932?
A. Yes sir.

Mr. Thompson: I object to the question as leading in using the word "the" as seeking by the—as assuming a relationship between that and the book; if there is an entry in the book why of course I have no objection.

Mr. Walton: Well I don't ask the witness for any—I will qualify it, I don't see the force of it myself but I will qualify it.

Q. Have you a book, a register containing in chronological sequence and order, filings of declaratory statements?
A. Yes sir.
Q. And covering the year of 1869?
A. Yes sir.
Q. And covering land in Utah territory?
A. Yes sir.
Q. Is this the book which you have produced?

A. Yes sir.

Q. And does that book contain an entry corresponding in number and name with this entry, this declaratory statement?

A. Yes sir.

Q. And is that found about or a little below the middle of a page of the book?

A. Yes sir.

Mr. Walton: We offer—of course this offer is addressed to the court, I assume of necessity the entire book for the purpose
36 of showing its regularity. I wish your Honor would examine it to see whether it is of chronological sequence and so forth. We offer in evidence the declaratory statement identified by the witness, and in connection therewith we offer the entry identified by the witness on page —.

The Witness: It is not paged.

Mr. Walton: Page blank but under date ——.

The Court: There seems to be a number.

The Witness: Yes number ——.

Mr. Walton: Number of statement 1932.

Mr. Thompson: Which reads as follows.

Mr. Walton: And I will read it into the record if there is no special objection to it.

Mr. Thompson: Yes; there will be an objection to the offer but not to reading it in.

Mr. Walton: Yes, which reads as follows:

"No. 1932, under number of statement, filed, under date of Statement—date of settlement June 10th '69, under column date, when filed, July 21, 1869, or July and 1869 appearing by ditto marks. Name, Malcolm Macduff, description——.

Mr. Thompson: North east quarter.

Mr. Walton: "North east quarter of south east quarter and south east quarter of north east quarter and Lots 2 and 3 section 23, Township 1 North, Range 1 West Under remarks relinquished north east south east and Lot 3, Section 23."

Mr. Thompson: Is that all?

Mr. Walton: No, no.

Q. I will ask you whether you have examined the records of the land office in reference to this tract so far as Lot 2 is concerned, or the entire entry, and are able to state whether there is any record in your offic of any cancellation or proceedings of any kind towards cancelling the entry?

37 Mr. Thompson: Object to that as irrelevant, incompetent, immaterial.

The Court: He may answer.

Mr. Thompson: Save exception.

A. As far as my examinations have gone there have been no proceedings at all of that nature.

Q. You have examined with that view?

A. I have.

Q. Have you any other book here that has any reference to this entry or any part of it?
A. I have what we call among our records the tract book.
Q. First what was the name of the book containing the one I called the register?
A. That is the register of declaratory statements.
Q. Now proceed with the—what you have to say about the tract book.
A. The tract book is number one and has relation—has reference to lands located north and west of Salt Lake Meridian.
Q. Yes, will you turn to the ——.
A. Red mark—of course this declaratory statement has in pencil—
Q. Yes; is this book you refer to one of the records of the office, the land office?
A. Yes sir.
Q. And is it kept regularly and chronologically and according to tracts?
A. Yes sir.
Q. And does it purport to contain dates of the sale of tracts at this office?
A. Yes sir.
Q. You have had to do with this book a good deal have you?
A. Yes sir.
Q. And have you examined it generally?
38 A. Yes sir.
Q. As to the method of its keeping?
A. Yes sir.
Q. The entries of course purport to be made a good many years ago?
A. Yes, some of them.
Q. Some thirty years ago?
A. Yes sir.
Q. And forty?
A. Yes.
Q. Does the book appear to be regularly kept?

Mr. Thompson: Object to that as calling for a conclusion of the witness, irrelevant, incompetent and immaterial.
Mr. Walton: Oh I will take the answer, I ask to *to* take the answer.
The Court: You may have it.
Mr. Thompson: Save exception.

A. Yes sir.
Mr. Walton: We offer in evidence so much as is now read from the tract book and in connection therewith to the court we offer the entire book. In pencil "D. S. No. 1932, Northeast quarter, southeast quarter and southeast quarter, northeast quarter and lots 2 and 3, June 10th and July 21st '69 Malcolm Macduff. W In red ink in the same line appears—I cannot read it, what is that?
The Witness: Pre. 41.
Q. Pre?
A. It is an abbreviation for pre-emption.

Mr. Walton: Pre. 41, Lot 4 Section 14 and lots 1 and 2 and northeast quarter northeast quarter section 23 Township 1 North 1 West.

The Witness: Range 1 West.

Mr. Walton: Yes, Range I West contains acres and hundredths 167.79 acres. Loc. per A. C. S. No. 364.

39 Del. Melcolm Macduff. Date of sale—I should say Malcolm Macduff name of purchaser, date of sale January 19th, 1871. No of receipt and certificate of purchase 14, patented June 5th, 1871 as per F. January 8th, 1909.

Q. That is all the books relating to this entry that you know of in the land office?

A. No, there would be one other similar to the register of declaratory statements in which the notation would be made that you have just read in red ink, final certificate register.

Mr. Walton: We offer in evidence now the declaratory statement *indictified* and produced by the witness.

Mr. Thompson: We object to that as irrelevant incompetent and immaterial; as incompetent because it doe- not appear when this declaratory statement was filed. As irrelevant and immaterial because—for the same reason, and also because if it was filed any time previous to the construction of a road as testified to by the witness Macduff it didn't operate to take title out of the United States or to vest it in this plaintiff or its predecessor in interest, and that it does not prove or tend to prove or establish any title to the premises in question—that is in suit, adverse to this defendant.

Mr. Walton: These matters of title I believe will be finally matters entirely for the court and we shall contend that notwithstanding it may appear that the land was within an incorporated town or city yet that in 1877 it was cured and the entry was validated; also that by reason of various acts of congress which we will either put in evidence or the court will take judicial notice of, the grant to the Utah Central, if there was one made as claimed by the defendant, itself, was precluded from covering land because the City of Salt Lake had a right of pre-emption in the nature I might say of a
40 float within the entire corporation, corporate limits; and thus that the Utah Central, if it had a grant over public lands, took no title to lands within the corporation because they were not public lands as to it any more than they were to a pre-emptor and that the attempted acquisition of title by Macduff was validated and the attempted acquisition of title by the Utah Central was not validated by any act of congress; but as I say these matters after the evidence is all in will, I assume, be a matter purely of law for the court and it is not a matter of course that can work any prejudice in admitting it at any time so we ask that the court either admit it now or reserve the ruling—that is not to exclude it in any event now.

Mr. Thompson: The court judicially knows from the opinion in Moon vs. Salt Lake County or Salt Lake City that the grant—that under the grant to the Utah Central a right of way was acquired through Salt Lake City down to the present terminal and my position is this that although the act of 1877 was curative it could not divest any more than as if patent had been granted by the govern-

ment and they subsequently granted to somebody else. The face of this book is a piece of land we will say which is not subject to entry. While it is not subject to right of entry, a right of way is granted across it and it has availed if taken and a right under it vests. The person however has gone on it without authority of law. The United States says we ought to do something to perfect the title and we are going to pass this act of '77, which they could do and did lawfully do, except that they could not divest them of such rights as existed on there, all the balance outside of that I grant, because it
41 is of no concern of mine, was cured but it didn't divest the Short Line or the Utah Central's title. If it had it would have divested of course all the way across into the center but it was flying in the face of law, constitutional law, to suggest that the title of the railroad company was divested and we insist that the subsequent grant of '77 does not help them as in the present suit. Now Mr. Walton I had anticipated that we would be able to stipulate that the Shore Line was the successor of the Utah Central and I am not prepared this forenoon to make that proof and maybe you will conclude before noon, so that if you wish to stipulate that the Oregon Short Line Railroad Company is the successor of the Utah Central I will consent and withdraw my objection to the admission of these documents, subject of course to legal construction.

Mr. Walton: Well I have nothing to trade and I will leave that matter entirely with Mr Wilson.

Mr. Thompson: Very well, I submit my motion unless Mr. Wilson sees fit——

The Court: I take it you desire to present this so that I may get your points from a legal standpoint?

Mr. Walton: Yes.

The Court: The court will receive it at this time subject to final ruling that I will make after it is presented.

Mr. Walton: Now may it be understood by the court or may the court make an order that the declaratory statement, the original may be withdrawn and Exhibit B——

The Court: Substituted for it?

Mr. Walton: Substituted for it now.

The Court: Yes, Mr. Woolley may take back the filed of his office and just substitute Exhibit B for this.

42 Mr. Thompson: Yes, of course that carries no admission nor nothing against me?

The Court: No, Just substituted the paper for the other.

Q. Mr. Woolley have you the map of the township 1 North 1 West the book containing those plats?

A. Yes sir.

Q. You produce a book, what is it called Mr. Woolley?

A. It is called our plat book No. 4 and has relation to lands north and west of the Salt Lake Meridian.

Q. Is that a record of your office?

A. Yes sir.

Mr. Walton: Mr. Thompson this is a little out of order.

Mr. Thompson: Yes.

Mr. Walton: And so far as it may be material we will undertake to furnish a copy, but identify it now, hereafter, because I don't want to call the witness back, and the idea is to furnish a copy, or if we deem it material either person may have a copy made and inserted.

Mr. Thompson: From the land office you mean?

Mr. Walton: Yes.

Mr. Thompson: Yes, let it go in, we will say, and your examination with reference to this go subject to the line of objection and exception that I had.

Mr. Walton: Certainly.

Mr. Thompson: Yes.

Q. Now you have here on the first page a map or plat of township 1 North Range 1 West, Salt Lake Meridian.

A. Yes, sir.

Q. And will that, is that liable to be changed by further entries in the next few days?

43 A. In so far as there may be vacant lands there it may be.

Q. But that—if any change is made it will be shown, it will appear, the date of the change, will it?

A. The date will not appear here on this record, the date will appear in the tract book.

Q. Now is this the map on which you extend matters of land or right of way or railroads?

A. Yes sir.

Q. And up to the present time what railroads or lines have been extended thereon?

Mr. Thompson: Object to that as irrelevant, incompetent and immaterial because if the Utah Central are not shown there at all, that resting—the grant resting upon act of congress and direct acceptance to president, it is immaterial whether it is shown here or whether it is not. It is offered in the presence of the jury and the effect is to cast reflections upon the grant and the right of the railroad company which is not subject to reflection in that manner.

Mr. Walton: We take it that it is a proper matter to be considered by the court under the circumstances.

The Court: It may be received.

Mr. Thompson: Save exception.

A. The record is an old one and the figures are somewhat faint but I see noted on this township plat a drawing indicating the right of way of the D. & R. G. R. R., also one indicating G. S.

Mr. Thompson: And H. S.

The Witness: And H——

Mr. Thompson: And H something.

The Witness: Great Salt Lake & Hot Springs is what it refers to although it is abbreviated as "G. S. L. & H. Springs."

Mr. Thompson: We move to strike the conclusion of the
44 witness as to what the reference is as being irresponsive and incompetent.

The Court: That part of it may go out.

The Witness: We also have noted here entries allowed subject to the right of way of the Utah Western Railway.

Mr. Walton: I am trying to prove of course a negative.

Q. Is the Utah Central or Oregon Short Line Railroad extended upon that map?

Mr. Thompson: We object to that as calling for a conclusion of the witness, as irrelevant, incompetent and immaterial.

The Court: He may answer.

Mr. Thompson: Save exception.

A. I also find here subject——

Q. Answer the other question.

A. Oh, I beg your pardon.

Q. Whether the Utah Central or Oregon Short Line Railroad Line is extended on the map.

A. I do not see any notation of that railroad up on the plat.

Q. And have you such an extension on any plat of that township in your office?

Mr. Thompson: We object to that question for the reasons last assigned.

The Court: He may answer.

Mr. Thompson: Save exception.

A. So far as my examination of the records have discerned I have failed to find any record of the right of way of the Utah Central Railway.

Q. And these are all the plats that you have in the office of that township?

A. Yes sir.

Mr. Walton: We offer in evidence the map referred to.
45 Mr. Thompson: I take it subject to my previous objections.

The Court: Yes; received in the same way.

Mr. Walton: You may cross examine.

Cross-examination by Mr. Thompson:

Q. Referring now to the plat regarding which you have just been speaking, you were about to say that you observed also something else, what was that?

A. That was——

Mr. Walton: Oh I wanted—pardon me—I left out one matter, not about this though.

Mr. Thompson: ——.

Direct examination resumed by Mr. Walton:

Q. Have you the record of the townsite of Salt Lake City entry?
A. Yes sir.
Q. Is it in that book?
A. Yes sir.
Q. Will you turn—is that a book regularly kept in your office?
A. Yes sir.
Q. What is the book called?
A. Tract book No. 1 South and west.
Q. And will you turn to the—that portion which indicates the entry of Salt Lake City to its townsite, is that on page——
A. On page 4 of the record.
Q. Is that book regularly kept in your office?
A. Yes sir.
Q. And does that indicate the description and date of entry of the various tracts?

46 Mr. Thompson: Object to that as incompetent, irrelevant and immaterial and calling for the conclusion of the witness and no proper foundation laid; and as to the balance of the questioning on this may I have the same objection as I did to the last and an exception?

Mr. Walton: Yes.

The Court: He may answer.

A. Yes sir.

Mr. Walton: We offer the entire book to the inspection of the court and for the purpose of showing the connection and competency of this entry, and we offer in evidence generally the entry referring to the townsite of Salt Lake City found on page 4 and commencing "Townsite Lots 1 and 2" and so forth, and Daniel H. Wells, Mayor, this entry generally.

Mr. Thompson: Yes it goes in subject to the same objection.

Mr. Walton: Yes; Townsite Lots 1 and 2 and south half section——

The Witness: Maybe you had better let me read it.

Q. You read it please into the record.

A. Townsite Lots 1 and 2 and the south half of Section 30 section 31, south half of section 32 1 North 1 East, east half Section 25, east half of northeast quarter southeast quarter and lots 3 and 4 of Section 35. Section 36 1 North 1 West lots 1, 2, 3 and 4 Section 4, Section 5, Section 6 North half Section 7 north half northeast quarter northwest quarter, Section 8 Lot 5 of section 9 1 South 1 East Section 1 Lots 1, 2 southeast northeast, east half of the southeast section 2, northeast northeast section 11 and north half section 12 township 1 North—or 1 South 1 West.

A. Acres.

47 A. Containing 5,730.45 acres at $1.25 an acre, $7,163.06. Daniel H. Wells, Mayor of Salt Lake City, in trust thereof, November 21st, 1871. Certificate No. —.

Q. Date of sale.

A. That was the date of sale November 21st 1871, certificate No. 710.

Mr. Walton: That is all.

The Witness: This has reference simply to an indemnity that the State selected for a school section.

Mr. Walton: Yes, I know; I think that is all, you may cross examine.

Cross-examination by Mr. Thompson:

Q. Now returning to my question which I put to you before Mr. Walton resumed his examination, what was that entry that you were about to speak of?

A. I find noted on the plat these words "subject to the right of way of the Great Salt Lake and Hot Springs Railway."

Q. Does that entry bear any date?

A. There is noted underneath "F May 6th 1892."

Q. There is some red ink writing above that entry isn't there, can you make out what that is?

A. Entries allowed subject to the right of way of the North Point Consolidated Irrigation Company; then underneath that is letter "F" October 14th 1891 or '96 I mean—'96.

Q. And the right hand corner of the book is missing altogether the upper part, isn't it?

A. A portion of it.

Q. Yes; now do you know when these various entries were made?

A. The notations on the——

Q. Yes.

A. No sir I could not say.

Q. It is a fact that in the early times according to your
48 observation there were many inaccu-acies and omissions with reference to the keeping of the early land office records in Salt Lake?

A. Yes sir.

Q. And so far as you know it may be due to that that the Utah Central is not shown, that is so far as you know?

A. Yes sir.

Q. There is a red line east of D. & R. G. in a somewhat parallel direction with the U. P. R. R. appearing on it is there not?

A. A little louder.

Q. With U. P. R. R. appearing under it is there not?

A. There is but that has no reference to that line.

Mr. Thompson: Now I move to strike the words "that has no reference" as a conclusion of the witness and not responsive.

The Court: It may go out.

The Witness: May I answer that.

The Court: Wait until counsel asks for it, it may go out for the present.

Q. Do you know about what authority for instance this Great

Hot Springs, this "G. S. & H." or "G. S. & H. S." line is placed upon this plat?

A. Under instructions contained in right of way circular; the clerk who handles it places the land there as near as he may as to the line covered by the right of way.

Q. And when was that right of way circular issued?

A. I could not say as to the date; it has been issued for many years past at different dates.

Q. You don't know how far back such circular exists?

A. I could not say at this time.

Q. I see; so that you couldn't say whether in 1870 or 1871 there was such a circular could you, you don't know?

A. I couldn't say positively.

Q. No; that is all as to that; just a moment; now calling
49 your attention to the book which you designated as how?

A. Tract book.

Q. Tract book?

A. No. 1 North and West.

Q. Yes, I observe that in a space to the right hand covering about half a page there is a clear line apparently for miscellaneous and other entries and on a line appearing opposite the Malcolm Macduff entry the following words, part in black ink as preceded with the red ink preceding. "Patented June 5th, 1871, as per F. January 8th, 1909." What does that item mean and what does it have reference to?

A. The date is given here which patent issued for this land included in Malcolm Macduff's entry and the letter F indicates the department at Washington from which the letter was sent or issued and the date of January 8th 1909 indicates the date of that letter, now my knowledge of the office——

Q. So that would appear to indicate that the letter transmitting the patent was dated January 1909?

A. No sir; my knowledge of the manner in which the office records are kept would indicate that we had written to the land office asking for the date of that patent it not being upon the records of the office and by this letter we were instructed that it was patented on June 5th 1871 and the date of the letter so instructing the office was dated January 8th 1909.

Q. Well this very record under column date of sale and which bears interest January 19th 1871 indicates the time of payment made and conclusion of the entrymen's dealings or transactions in the local land office does it not?

A. Yes sir.

Q. And was it or was it not customary to keep in the local land office here a record or memorandum or entry showing the date of patent of various lands for which patent issued within this district?

50 A. In answer to a question sometime ago by you I stated that there were very many inaccuracies in the early records and this is evidently one of the places where notation was not made when patent was received.

Q. So that this matter of patent issuing January 5th 1871 is not a matter of original entry?

Mr. Wilson: You mean June 5th don't you Mr. Thompson?

Q. Yes, June 15th 1871, is not a matter of original entry but an entry that someone has made pursuant as you suppose to some correspondence with Washington.

A. Yes sir.

Q. You haven't letter F with you have you?

A. No sir I was not asked to bring that.

Q. Have you had reference to it, have you observed it or seen it recently?

A. No sir.

Q. I assume that there was at least two letters, was a request and a reply, were there not?

A. There would be a letter as I take it as you state rightly, that I suppose——

Q. Yes.

A. That we would have a press copy of the letter written to Washington and that this would be our letter on return.

Q. If I call in the land office between one and half past would you have that file there, will you be there?

A. Yes sir.

Mr. Thompson: That is all.

51 Redirect examination by Mr. Walton:

Q. Counsel asked you with reference to the initials U. P. R. R. on the map of the township 1 North 1 West on certain tracts or parts of sections: I will ask you to state what that indicates.

A. Those letters indicate that the tract——

Mr. Thompson: Just a moment I object to that as calling for the conclusion of the witness and no proper foundation laid

The Court: He may answer.

Mr. Thompson: Save exception.

A. The initials upon those tracts indicated that that land had been selected and patented as U. P. R. R., had no reference to the railway whatever.

Mr. Walton: While of course if the court please a witness is always subject to call, yet these books are in use constantly and Mr.——

Mr. Thompson: We concede that they are in use constantly and you may take them back if you wish to.

The Court: All right.

Mr. Walton: I think that is all. I renew the offer in evidence at this time of Exhibit A being the abstract, and I will say in offering it that we assume that every matter in it, not offering to read it now but simply offering it in evidence, is a matter of law, and taken altogether with the other evidence is a matter of title, pertains

wholly to a matter of title and we renew the offer of Exhibit A and we except to show further by other witnesses in line with the testimony of Mr. Macduff that the land was never used for municipal purposes. In other words showing that it was such land as was within the language of the act of 1877, March 3d.

Mr. Thompson: I renew my objection as heretofore made
52 and desire that that shall extend to the abstract as a whole and to each item thereof; and further upon the ground that, assuming that all that appears in the abstract to be true, it is irrelevant and immaterial.

The Court: There seems to be an objection made to some parts of that, the statement of the abstractor that he was told so and so by a clerk at the land office which is objected to as hearsay.

Mr. Walton: Those things we do not think are any part of the abstract that is recognized as evidence by the law.

The Court: I take it you do not insist upon those being received?

Mr. Walton: No.

The Court: Outside of those it will be received.

Mr. Thompson: Save exception.

* * * * * * *

53 Mr. Wilson: We rest your Honor.

Mr. Thompson: If the court please we move for non suit at this time on the two following grounds, that it does not appear that—no—that by paragraph 3 of the complaint the plaintiff alleges ownership as follows:

54 "That the plaintiff at all times hereinafter mentioned was the owner and entitled to the possession of that certain tract of land," with description following. That plaintiff has failed in his proof on that subject; that he has failed to prove any damages to himself, that is to the plaintiff corporation. As a second ground we move for non suit for the reason that as pleaded in the demurrer and likewise in the answer to the last complaint the cause of action is barred by the statute of limitation Section 2883 of the Compiled Laws of Utah; and that it is also barred by Section 2877, subdivision 2, Compiled Laws of Utah 1907. Upon reference, taking the last——

The Court: Well now how long will the argument take?

Mr. Thompson: Well now I will be glad to submit these two points briefly and quickly. One of them has been heretofore considered by you and I think upon a comparison of the amended complaint and the other that a conclusion can be drawn; and the other one it seems to me is as soon concluded as it is said.

The Court: Well I will let the jury retire to the hall if you think you can present it in a few minutes.

Mr. Thompson: I think I can.

The Court: You will retire to the hall, and remember the admonition given to you not to talk about the case.

Thereupon, Mr. Thompson argued the motion for non suit to the court.

Thereafter, and before the conslusion of Mr. Thompson's argu-

ment, the jury was called in, admonished in form of the statute and excused until 10 o'clock tomorrow morning.

55 The witnesses were also excused until said time.

Thereupon, said motion for non suit was argued to the court by respective counsel.

At 4:45 o'clock P. M. an adjournment was had until tomorrow morning at 10 o'clock.

WEDNESDAY, September 10th, 1913—10:30 o'clock A. M.

Jury called; all present.

The Court: I am going to excuse the jury until two o'clock.

At this time the jury was admonished in the form of the statute and a recess was had until 2 P. M. of this day.

WEDNESDAY, September 10th, 1913—2 P. M.

Jury called; all present.

The Court: Motion for non suit will be overruled.

Mr. Thompson: Save exception. If the court please we, lest it may be a private act and the court shall not take judicial notice of it, we offer in evidence from volume 167 United States Statutes at large published by Brown, Little & Co. by authority of Congress, this volume being taken from the public library here.

Mr. Wilson: I would say to counsel right now that I concede that the court can take judicial notice of the acts of the Federal Congress.

Mr. Thompson: That he take judicial notice of this?

56 Mr. Walton: Of all public and private acts; it might be well to call his attention to the particular act.

Mr. Thompson: It will be all right if the question is not raised.

Mr. Walton: It is conceded that courts take judicial notice of acts of Congress public and private.

Mr. Thompson: And this particular act of December 18th, 1870?

Mr. Walton: Oh yes.

Mr. Thompson: Entitled "An act Granting to the Utah Central Railroad Company the Right of Way Through the Public Lands for the Construction of a Railroad and Telegraph Line."

Mr. Wilson: That or any other act Mr. Thompson.

Mr. Thompson: Yes, just so that is clear.

Mr. Walton: Yes, no question about that.

Mr. Thompson: Will you mark those as Defendant's exhibits 1, 2 and 3.

(Marked.)

Mr. Thompson: The defendant offers in evidence its Exhibit No. 1, being a certified copy of the resolution of the Board of Directors of the Utah Central Railroad Company accepting the grant just referred to; also a certified copy of letter of Secretary of State acknowledging the receipt of the resolution and acceptance.

Mr. Walton: What number is that?

Mr. Wilson: That is 2.

Mr. Thompson: No. 2; and No. 3 certified by the Secretary of the Interior, a letter transmitting a map of location of the Utah Central Railroad Company to the Secretary of the Interior and his acknowl-

edgment of the map in connection with which I shall later offer the map.

57 Mr. Wilson: Just a moment if your Honor please until we examine them and see if we have any objection. It may be received your Honor as far as we are concerned, without objection.

The Court: Very well.

Mr. Thompson: What were your remarks Mr. Wilson?

Mr. Wilson: I simply said we have no objection, unless Mr. Walton now has one.

Mr. Walton: No, I think not.

Mr. Thompson: Will you mark that No. 4? (Marked.) I now offer in evidence, if the court please, a map or more strictly speaking a tracing certified by the commissioner of general land office together with a copy of letter thereto attached and likewise certified to be copy of map and letter filed in that office.

Mr. Wilson: Exhibit 4?

Mr. Thompson: Yes.

Mr. Wilson: Your offer, so the record shows is with reference to Exhibit 4.

Mr. Thompson: Yes, Exhibit 4; and I shall ask the court, as it is a permanent record of the office, to substitute in place of it a copy which I have here and which I know to be a true copy, which I offer for inspection and comparison.

Mr. Wilson: Do I understand Mr. Thompson you wish to substitute that for this?

Mr. Thompson: If I may, yes.

Mr. Walton: Let me ask you, is this an exact copy manifold of blue print?

Mr. Thompson: Yes, it is taken off of this by machinery, it is a true copy.

Mr. Walton: An absolute facsimile by blue print or photograph process?

Mr. Thompson: Yes, a white print instead of a blue print.

58 Mr. Walton: And what do you claim that it purports to show the original, not the present tract, but the original?

Mr. Thompson: As located across there.

Mr. Walton: As originally constructed?

Mr. Thompson: And showing the main line, yes.

Mr. Wilson: No objection your Honor.

The Court: Yes; let that be marked also.

(Marked "Exhibit Ex. 4 substituted.")

Mr. Thompson: Mark those in the following order: (Exhibits 5, 6, 7 and 8 respectively marked for identification.) I now offer in evidence defendant's Exhibit No. 5, being a certified—being a copy of the articles of incorporation of the Utah Central Railroad Company certified by the State Auditor of Utah as having been filed with him, certified on the 8th day of November 1900.

Mr. Wilson: No objection.

The Court: Received.

Mr. Thompson: Also offer in evidence articles of association of

the Utah Central Railway Company certified by the Secretary of State of the State of Utah, Exhibit No. 6.

Mr. Wilson: No objection.

The Court: Received.

59 Mr. Thompson: Also offer in evidence Exhibit 7, being a certified copy of articles of association, of the Utah Central Railroad Company certified by the Secretary of State of the State of Utah.

Mr. Wilson: No objection.

Mr. Thompson: Also offer in evidence Exhibit 8, being articles of consolidation and agreement between the Utah Central Railway Company and other railroads certified by the Secretary of State of Idaho, according to the certificate and contents thereof.

Mr. Wilson: State of Idaho do you mean?

Mr. Thompson: No, did I say Idaho Mr. Wilson?

Mr. Wilson: Yes.

Mr. Thompson: Utah, change that in the record, defendant's exhibit 8.

Mr. Wilson: What is the purpose of this?

Mr. Thompson: This is proving the change of title.

Mr. Wilson: Oh, I see. This refers to the old Oregon Short Line and the Utah Northern?

Mr. Thompson: Yes, it is incorporated there into Oregon Short Line.

Mr. Walton: This Exhibit 8 is objected to as incompetent, irrelevant and immaterial and because the laws in force in this territory and state did not authorize such a consolidation at the time. This objection of course is addressed wholly—that is, it is a matter of title and wholly to the court, and I am not prepared to argue it now, but I would like to have the benefit of it.

Mr. Wilson: I would like to look it over; it is too long to do so now.

The Court: I will receive it now and you may present it later.

Mr. Thompson: It is overruled I take it.

60 The Court: It is overruled pro forma.

Mr. Wilson: And we may have an exception?

The Court: Certainly.

Mr. Thompson: May it please the court there was—after the Oregon Short Line and Utah Northern Railway Company was organized, it issued a mortgage which was foreclosed and purchased by the Oregon Short Line Railway Company, as I shall show, and I was unable to procure a certified copy of so much of the record as was necessary, but I have Judge Marshall's consent to use this in court today from his office, so I will ask, after offering it in evidence for leave to withdraw it, with the understanding that we may get copies from there at any time it may be necessary. I offer from Circuit Court files No. 9 Equity No. 6 in the action of the American Loan and Trust Company against Oregon Short Line and Utah Northern Railway Company, commenced in the United States Circuit Court of the District of Utah in 1894, the Bill of Complaint of the American Loan and Trust Company against the Oregon Short Line and

Utah Northern Railway Company, filed for the purpose of foreclosing a mortgage to secure bonds issued by that railroad company; the answer of the Oregon Short Line and Utah Northern Railroad Company in that complaint; the final decree directing the sale of the property in question, and the decree confirming sale.

Mr. Walton: The property in question in that action.

Mr. Thompson: In that action which upon reference to it, it will be observed embraced the property in question, the line of the Oregon Short Line Railroad the line there from Ogden to Salt Lake City.

Mr. Wilson: Can you indicate the pages of the record where we may find by examination of the transcript?

Mr. Thompson: I can with a little more time; I cannot
61 locate it for you at this moment.

Mr. Walton: Not having had time to examine it in details, we will object to it as incompetent and irrelevant and immaterial.

The Court: I will receive it.

Mr. Walton: Save an exception.

Mr. Wilson: We can examine it later.

The Court: Yes.

Mr. Thompson: And you don't need to deliver it to the stenographer since I have to take it back.

The Court: No.

Mr. Wilson: We wouldn't bother anything about that, that isn't the idea of our objection, we wouldn't want to waive anything, but we have had no opportunity to examine it your honor.

Mr. Thompson: Mark this as the next exhibit.

Mr. Walton: Number——

Mr. Thompson: You will have to leave a number for the other will you not? I think you had better leave a number for those others. (Circuit Court files was marked Exhibit 9 when copy of same was furnished to the reporter.)

Mr. Wilson: Your honor understood we reserved an exception to your Honor receiving that, so that we might examine it.

The Court: Let the stenographer note that when he gets through there.

Mr. Wilson: Yes.

(Articles of Incorporation of the Oregon Short Line Railroad Company Marked for identification Exhibit 10.)

Mr. Thompson: I now offer in evidence Exhibit 10, being certified copies of the Articles of Incorporation of the Oregon Short Line Railroad Company, organized February first 1897.

Mr. Wilson: No objection to that.

The Court: Received.

62 Mr. Thompson: I don't know how long the other side will take but I will be able to present my points inside of half an hour or less.

The Court: I will excuse the jury until tomorrow morning.

At this time the jury was admonished in the form of the statute and excused until tomorrow morning at 10 o'clock.

Mr. Thompson: The defendant moves the court for a directed

verdict in its favor upon the following grounds: 1st. That it appears by the evidence that while the land in question was public land of the United States and subject to disposal by Congress, Congress by its act conveyed a right of way two hundred feet—four hundred feet in width of which this is a portion, to the Utah Central Railroad Company, which as appears by the evidence is predecessor in interest of the Oregon Short Line Railroad Company. I don't make it on the ground alone that the Oregon Short Line Railroad Company has title by chain which is shown here, but inasmuch as the right of way was granted to the Utah Central Railway four hundred feet in width, and this is within the limits of it, that title having passed and never having been acquired by the plaintiff or the plaintiff's predecessors in interest, they are unable to make proof of title in them. In making that statement though I don't wish to be regarded as in any way waiving any portion of my first point which I am going to discuss at length.

Secondly. The land was not subject to preemption or homestead entry by Malcolm Macduff, and, title has never passed out of the United States as yet except for the right of way in question.

63 Third. The plaintiff has failed to prove title and has failed to establish the allegation of its complaint that it was the owner of the land at the time in question. I will elaborate on that later.

Fourth. That the action is barred by either or both of the provisions of the statute of limitations pleaded in the answer of the Oregon Short Line Railroad Company.

Thereupon, said motion was argued to the court by respective counsel.

Thereafter, the further hearing of said cause was adjourned until to-morrow morning at 10 o'clock.

THURSDAY, September 11th, 1913—10 A. M.

(Jury not present, having been excused until 2 o'clock of this day.)

The Court: You may proceed.

Mr. Thompson: If the court please I stated yesterday that I might want to introduce a deed and for the sake of safety I will now introduce a deed. Mr. Young will you be sworn.

ROYAL B. YOUNG, called as a witness on behalf of the defendant, being first duly sworn testified as follows:

Direct examination by Mr. Thompson:

Q. What is your first name Mr. Young.
A. Royal B. Young.
Q. You are deputy County Recorder are you not?
A. Yes sir.

* * * * * * *

64 Mr. Walton: I suppose you again rest?
Mr. Thompson: Yes.

Mr. Walton: And we rest.

Mr. Thompson: I will say first it is admitted isn't it that there was only one line of railroad of the Oregon Short Line & Utah Northern extending south through Davis and Salt Lake Counties?

Mr. Walton: Yes.

At this time the plaintiff moves the court, both parties having finally rested, to direct the jury as a matter of law that the title the plaintiff has—has and had the better title to the real estate.

Mr. Thompson: Which is of course resisted.

65 The Court: Of course the court cannot rule on that yet.

Mr. Walton: No, so far as we are concerned we don't apprehend or conceive that there is any question for a jury as to the title.

Mr. Thompson: No, I agree with you, I think it is a question of law purely.

Mr. Walton: That is our position also.

The Court: I will state to counsel as I did this morning the court's view of the case is this, that if there is anything goes to the jury, it is just the mere question of the amount that they would find; I don't know of anything else that would be submitted to the jury.

Mr. Thompson: That occurs also to me but anything—any difference we may have in the way it is presented to the jury is simply—if it ever goes there, is simply on the measure of damage and the method of instructing on that.

The Court: That is all the court has—if I instruct the jury it will only be on that.

Thereupon, the motion for a directed verdict was further argued to the court by respective counsel.

Thereafter, a recess was had until 2 P. M. of this day.

THURSDAY, September 11th, 1913—2 P. M.

(Jury not present, having been excused until 10 o'clock tomorrow morning.)

Thereupon the motion for directed verdict was further argued to the court by respective counsel.

Mr. Thompson: If it please the court at the time Exhibit

66 A, being an abstract offered in evidence in this case, was tendered, my understanding was that it was for the purpose of establishing the title of the plaintiff. Comment has been made on an item appearing there which appears to me to be irrelevant, incompetent and immaterial and not a proper subject to go before the jury, being item No. 5, consisting of a record of a deed from Malcolm Macduff to the Utah Central Railroad Company. I submit as to that item that it is irrelevant, incompetent and immaterial to the present issues in this case; no estoppel is claimed, no estoppel is pleaded, and it has been conceded by counsel and I believe is the clearly established law, that it does not operate in law in any way against the railroad company, the fact of its having taken a deed to its own premises. The only purpose that it could serve would be, as it appears to me in the light of the issues, improper comment before

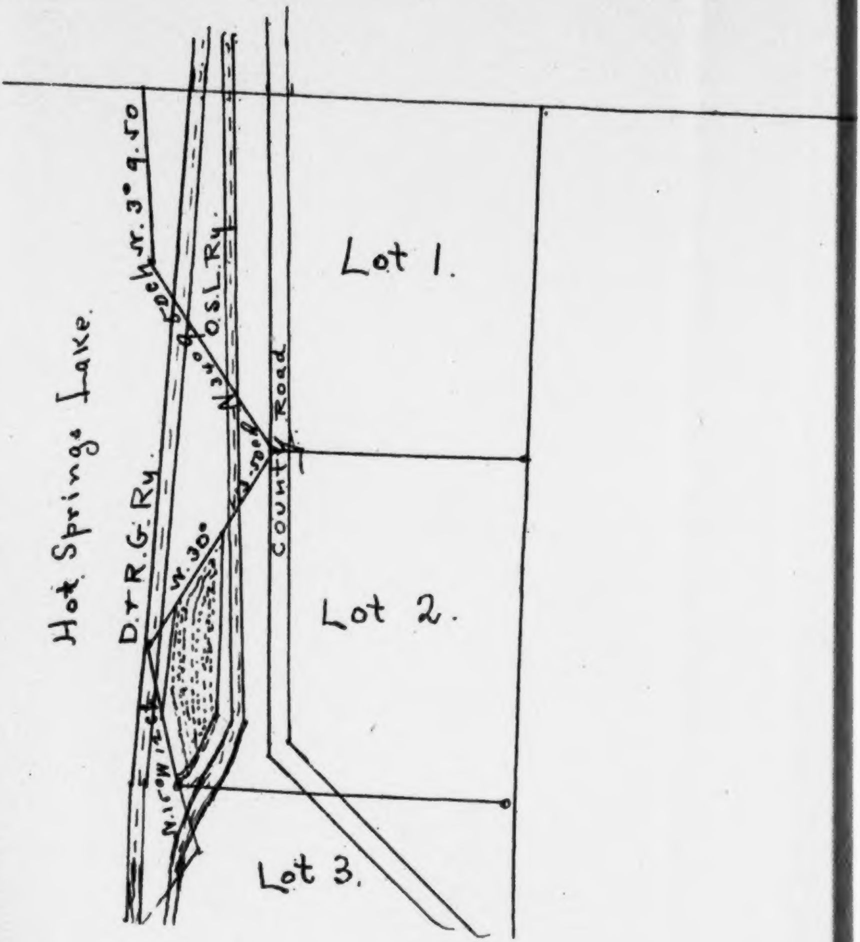

Exhibit
"B"

the jury, so that I move at this time—I renew or make my motion at this time—I make the motion I—I submit the motion which I have heretofore made and ask that that be excluded from the consideration of the jury.

Mr. Walton: I apprehend from an understanding we had in open court, the reporter not being present, that we both agreed that we wouldn't ask to go to the jury either one of us, on the question of title.

Mr. Wilson: I think the reporter was present.

Mr. Walton: So that we claim it is a proper matter for the consideration of the court in determining that question.

The Court: Well, we will limit it this way, you will not be permitted to use it before the jury.

Mr. Walton: I apprehend when that question is determined it is no use to try to argue the question to the jury.

67 The Court: All right I will pass on this the first thing in the morning.

At this time the further hearing in said cause was continued until tomorrow morning at 10 o'clock.

FRIDAY, September 12th, 1913—10 a. m.

Jury called; all present.

The Court: So as to make the record, I will overrule the motion made by the defendant.

Mr. Thompson: Save exception.

* * * * * * *

68 EXHIBIT "A."

SALT LAKE INVESTMENT COMPANY
v.
O. S. L. R. R. Co.

C. C.

Abstract of Title.

Prepared by G. H. Backman, Licensed Abstractor, in and for the County of Salt Lake, Utah.

Of, in or to that certain piece or parcel of land situated in the County of Salt Lake and State of Utah, and described as follows, to-wit:

All that portion of lot 2, in Section 23, Township 1, North of Range 1 West, Salt Lake Meridian, that lies between the right of way of the Oregon Short Line and Utah Northern Railway and the right of way of the Rio Grande Western Railway Company.

Plat of property described in accompanying abstract.

(Here follows diagram marked page 68a)

69 *Kind of Instrument, Receiver's Receipt.*

United States of America
to
Malcolm Macduff.

Item No. 1.
Filed —.
Recorded in Book "—" of Page —.
Dated —.
Consideration, $—.
No. of Witnesses —.
Acknowledged —.

Description.

On the face of the record in the General U. S. Land Office at Salt Lake City, above the receiver's receipt, appearing in item #2 of this abstract, appears the following written in pencil:

"No. 1932 x N. E. 4 S. E. 4 N. E. 4 and Lots 2 & 3 June 10 and July 21/69 Malcolm Macduff."

Which according to statement of the attachees at the Land office means:—

Declaratory statement No. 1932, Filed July 21, 1869 alleging settlement June 10, 1869. Located by Malcolm Macduff.

Kind of Instrument, Receiver's Receipt.

G. B. Overton, Receiver,
to
Malcolm Macduff.

Item No. 2.
Filed Mar. 4, 1871.
Recorded in Book "D" of L. & L. Page 841.
Dated Jan. 19, 1871.
Consideration $—.
No. of Witnesses, —.
Acknowledged —.

Description.

Agricultural College Act of July 2, 1862.

Excess Receipt No. 572.

Received from Malcolm Macduff, of Salt Lake County, the sum of $9.74, being in full for 7.79 acres of Lots 1 and 2, and north east ¼ of Section 23, and lot 4, Section 14 Township 1, north of Range 1 West, being excess in said tract over the area located by virtue of Agricultural College Scrip, Certificate No. 364, State of Delaware R. & Rs. No. 14.

Exhibit "A" Salt Lake Inv. Co. v. S. L. R. R. Co.—C. C.

70 *Kind of Instrument, Certificate of Location.*

Geo. B. Maxwell, Register,
to
Malcolm Macduff.

Item No. 3.
Filed March 6, 1871.
Recorded in Book "D" of L. & L. Page 844.
Dated Jan. 19, 1871.
Consideration $—.
No. of Witnesses —.
Acknowledged —.

Description.

Agricultural College Act of July 2, 1862.

Scrip No. 364 State of Delaware has this day located in the name of Malcolm Macduff upon lots 1 and 2, and the Northeast ¼ of Northeast ¼ of Section 23, and Lot 4, Section 14, Township 1, North of Range 1 west, 167.79 acres.

Kind of Instrument, Patent.

The United States of America
to
Malcolm Macduff.

No. 4.
Filed April 17, 1872.
Recorded in Book "e" of Deeds. Page 895.
Dated June 6, 1871.
Consideration, $—.
Agricultural College scrip —.
No. of Witnesses, —.
Acknowledged —.

Description.

Lots 1 and 2 and Northeast ¼ of Northeast ¼ of Section 23, and Lot 4, Section 14, Township 1 North of Range 1 West, in the district of lands subject to sale at Salt Lake City, Utah. Containing 167.79 acres.

71 *Kind of Instrument, Warranty Deed.*

Malcolm Macduff
to
Utah Central Railroad Company, a Corporation.

Item No. 5.
Filed June 13, 1870.
Recorded in Book "D" of Deeds. Page 595.
Dated, June 7, 1870.
Consideration, $1.00.
No. of Witnesses, two.
Acknowledged, O. K.

Description.

All that portion of land situated in the Northeast ¼ and the southeast ¼ of Section 23, Township 1, North of Range 1 West, U. S. Survey, Salt Lake Meridian, within lines parallel with the line of said railroad as now located on each side of the line of said road at a distance of 50 feet therefrom. A certified map of said road as now located being duly recorded in the Recorder's office of said county.

Kind of Instrument, Map of Utah Central Railroad as Connected with U. S. Survey in Salt Lake County.

Item No. 6.
Filed May 10, 1870.
Recorded in Book "A" of Plats. Page 45.
Dated, May 4, 1870.
Consideration, $—.
No. of Witnesses, —.
Acknowledged —.

Description.

Map certified by Brigham Young, President, and John W. Young, Secretary of Utah Central Railroad Company; and certified as correct by Jesse W. Fox, Chief Engineer.

Shows the said railroad to run along the east line of Hot Springs Lake near western boundary of Lots 1, 2 and 3, Section 23, Township 1, North of Range 1 West, exact location is not shown.

72 *Kind of Instrument, Quit-claim Deed.*

Malcolm Macduff
to
Ellen Macduff.

Item No. 7.
Filed Nov. 16, 1878.
Recorded in Book "N" of Deeds. Page- 371-2.
Dated, Nov. 15, 1878.
Consideration, $2,000.
No. of Witnesses, two.
Acknowledged, O. K.

Description.

Lot 1 and 2, and the northeast ¼ of the northeast ¼ of Section 23, and the lot numbered 4 of section 14, in Township 1 north of Range 1 west in district of lands subject to sale at Salt Lake City, Utah Territory. Containing 167 acres and 79/100 of an acre.

Kind of Instrument, Quit-claim Deed.

Ellen Macduff
to
Malcolm Macduff.

Item No. 8.
Filed Nov. 16, 1878.
Recorded in Book "N" of Deeds. Page 373.
Dated, Nov. 15, 1878.
Consideration $700.
No. of Witnesses two.
Acknowledged, o. k.

Description.

Parts of lots 1 and 2, commencing about 40 rods west from the southeast corner of said lot 2, and running thence about 30 rods, more or less, to the lake; thence north about 120 rods; thence about 80 rods east; thence south about 90 rods; thence west about 48 rods; thence south about 39 rods to the place of beginning. Containing 45 60/100 acres, more or less; all situated in the northeast ¼ of section 23, Township 1 North of Range 1 West of Salt Lake Meridian.

73 *Kind of Instrument, Warranty Deed.*

Ellen Macduff
to
Thomas Hancock.

Item No. 9.
Filed Oct. 26, 1886.
Recorded in Book "2-C" of Deeds, Page- 387-8.
Dated Mar. 31, 1881.
Consideration, $1,000.00.
No. of witnesses, two.
Acknowledged, O. K.

Description.

Commencing at the northeast corner of Lot 2 in section 23, and containing all of said lot with the exception of 14 acres, more or less, at the southeast corner deed by Malcolm Macduff to Giles B. Overton, containing about 26 acres, more or less, reserving however 50 feet on each side of the Utah Central Railroad Track, all of above described property is situated in Township No. 1 North of Range 1 West, Salt Lake Meridian.

Kind of Instrument, Warranty Deed.

Ellen Macduff
to
Malcolm Macduff.

Item No. 10.
Filed October 1, 1881.
Recorded in Book "R" of Deeds, Page 643.
Dated Aug. 13, 1881.
Consideration, $100.
No. of witnesses, two.
Acknowledged O. K.

Description.

Being 50 feet from the center of the Utah Central Railroad Track on each side of track running easterly and westerly, and beginning at the northern line of lot 4, section 14, thence south 240 rods; thence northerly 240 rods; thence easterly to place of beginning, lying in lots 1 and 2 in section 23, and lot 4 in section 14, Township No. 1, North of Range No. 1 West, Salt Lake Meridian.

74 *Kind of Instrument, Warranty Deed.*

Thomas Hancock
to
Denver & Rio Grande Western Railway Company.

Item No. 11.
Filed April 11, 1890.
Recorded in Book "3-O" of Deeds, Page 153.
Dated Apr. 28, 1884.
Consideration, $25.00.
No. of witnesses, One.
Acknowledged O. K.

Description.

Begin-ing at intersection line of courses number- 5 and 6 of the meander lines of Hot Springs Lake in section 23, Township 1 North of Range 1 west; thence N. 30 deg. E. 145 feet to the west boundary line of the Utah Central Railway lands; thence southerly along the west boundary line of said railway lands and 40 feet east and parallel to the center line of the Denver & Rio Grande Railway as now constructed, 375 feet to said meander line number 5; thence N. 15 deg. W. 250 Feet, to the place of beginning, being all of that part of lot 2 in said section 23 lying west of the right of way of the Utah Central Railway.
Containing 3/10 of an acre.

Kind of Instrument, Decree.

In the Probate Court in and for Salt Lake County, Utah.

In the Matter of the Petition of Thomas Hancock for a Decree of Conveyance from Estate of Malcolm Macduff.

Item No. 12.
Filed Feb. 9, 1889.
Recorded in Book "2-S" of Deeds, Page 157-9.
Dated Nov. 20, 1888.
Consideration, $—.
No. of Witnesses, —.
Acknowledged, certified, O. K.

Description.

* * * Ordered, adjudged and decreed by the court that the administratrix of said estate, to-wit: Jane Macduff be, and *chs* is hereby authorized and directed to make and execute a good and sufficient deed conveying to said Thomas Hancock the property hereinafter

described, the same being the real estate sold to said petitioner by said Malcolm Macduff, commencing at the northeast corner of lot 2, in section 23, and containing all of said lot with the exception of 14 acres, more or less, at the southeast corner deeded by Malcolm Macduff to Giles B. Overton, containing about 26 acres, more or less, reserving however 50 feet on each side of the Utah Central Railroad Track. All of above described property is situated in Township No. 1, North of Range 1 west, Salt Lake Meridian.

75 *Kind of Instrument, Warranty Deed.*

Thomas Hancock and Sarah A. Hancock, Wife,
to
Joseph Morris.

Item No. 13.
Filed Jan. 8, 1903.
Recorded in Book "6-J" of Deeds. Page- 170-1.
Dated Apr. 8, 1890.
Consideration $500.00.
No. of Witnesses one.
Acknowledged O. K.

Description.

All that part of lot 2, Section 23, Township 1 North of Range 1 West, U. S. Survey, Salt Lake Meridian, that lies between the right of way of the O. S. L. & U. N. Railways, and the right of way of the R. G. W. Railway, the said rights of way being 50 feet distant from the center of the tracks of said railways. Containing one acre or there about.

Kind of Instrument, Administratrix Deed.

Jane Macduff, Administratrix of the Estate of Malcolm Macduff, Deceased,
to
Thomas Hancock.

Item No. 14.
Filed Feb. 19, 1889.
Recorded in Book "2-S" of Deeds. Page- 157-60.
Dated, Dec. 10, 1888.
Consideration $1.00.
No. of Witnesses two.
Acknowledged, O. K.

Description.

Commencing at the northeast corner of lot 2, in section 23, and containing all of said lot with the exception of 14 acres, more or less

at the southeast corner deeded by Malcolm Macduff to Giles B. Overton, containing about 26 acres, more or less, reserving, however 50 feet on each side of the Utah Central Railroad Track. All of above described property is situated in Township No. 1, North of Range 1 West, Salt Lake Meridian.

Pursuant to decree made November 20th, 1888, by Probate Court of Salt Lake County, Utah Territory, a certified copy of which is hereto annexed for record herewith.

76 *Kind of Instrument, Tax Sale.*

County Treasurer of Salt Lake County
to
Salt Lake Investment Co.

Item No. 19.
Filed —.
Recorded in Book — of —. Page 29, line 8.
Dated, Dec. 21, 1904.
Consideration $4.70.
No. of Witnesses —.
Acknowledged —.

Description.

All that portion of Lot 2, section 23, Township 1, North Range 1, west, that lies between the right of way of Oregon Short Line and N. & N. Ry. and R. G. W. the said right of way being 50 feet distant from center of track of said railways. The said portion of said lot 2 running from North to South of said lot one acre.

Sold for taxes 1904 assessed to Joseph Morris.
See Auditors Deed in "7-K" page 137.

Kind of Instrument, Tax Sale.

County Treasurer of Salt Lake County
to
Salt Lake County.

Item No. 21.
Filed —.
Recorded in Book — of —. Page 32, Line 19.
Dated Dec. 20, 1906.
Consideration $4.87.
No. of Witnesses —.
Acknowledged —.

Description.

(Property described same as property in item #19 of this abstract.)

Sold for taxes 1906 assessed to Joseph Morris $4.87.
Taxes 1908 $2.76 paid by Joseph Morris Oct. 27, 1908.
Taxes 1907 charged, $3.03.
Assigned to Joseph Morris Jan. 22, 1909, for $9.55.

77 *Kind of Instrument, Decree of Conveyance.*

Territory of Utah, County of Salt Lake.

In the Probate Court in and for said County.

In the Matter of the Petition of Thomas Hancock, for a Decree of Conveyance from the Estate of Malcolm Macduff, Deceased.

Item No. 22.
Filed Jan. 5, 1907.
Recorded in Book "2-J" of L. & L. Page- 456-7.

Dated Nov. 20, 1888.
Consideration $—.
No. of Witnesses —.
Acknowledged Certified O. K.

Description.

A petition having been presented to this court by Thomas Hancock and duly filed Oct. 19, 1888 praying for a decree of conveyance to him of certain real estate therein described, purchased by him of Malcolm Macduff deceased, whose estate is in process of administration in this court and setting forth the reasons for such decree being made. * * *

Said matter coming on regularly to be heard on the 20th day of November said petitioner appeared and it was duly shown to the satisfaction of the court that he had purchased said real estate from said Malcolm Macduff before his death; that the deed for the same was made by Ellen Macduff and before the same was recorded said property was conveyed in connection with other real estate to Malcolm Macduff, and that the title to said property was therefore in the said estate, and it being also shown that possession of said property had been transferred to said petitioner in the lifetime of said Macduff, and that the petitioner had held peaceable possession thereof from that time till the present.

Wherefore it is ordered, adjudged and decreed by the court that the administratrix of said estate, Jane Macduff, be, and she is hereby authorized and directed to make and execute a good and sufficient deed conveying to said Thomas Hancock his heirs and assigns forever, the property hereinafter described, to-wit:

Commencing at the northeast corner of Lot 2, section 23, and containing all of said lot with the exception of 14 acres more or less at the southeast corner deeded by Malcolm Macduff to Giles A. Overton, containing about 26 acres more or less reserving however 50 feet on each side of the U. C. R. R. track. All of the above described property is situate in the Township No. 1, North of Range No. 1 West, Salt Lake Meridian.

ELIAS A. SMITH, *Judge.*

78 *Kind of Instrument, Administratrix Deed.*

Jane Macduff, the Duly Appointed, Qualified and Acting Administratrix of the Estate of Malcolm Macduff, Deceased,
to
Thomas Hancock.

Item No. 23.
Filed Jan. 5, 1907.
Recorded in Book "7-J" of Deeds. Page- 253-4.
Dated, Mar. 12, 1892.
Consideration $1.00.
No. of Witnesses two.
Acknowledged O. K.

Description.

(Same property as 2-J of L. & L. pages 456-7.) Pursuant to order of Probate Court dated Nov. 20, 1888.

Kind of Instrument, Auditor's Deed.

F. Heginbotham, as Auditor of Salt Lake County,
to
The Salt Lake Invest. Co.

Item No. 25.
Filed Sept. 25, 1909.
Recorded in Book "7-K" of Deeds. Page- 137-9.
Dated Sept. 22, 1909.
Consideration $4.70.
No. of Witnesses one.
Acknowledged O. K.

Description.

All that portion of lot 2, Section 23, Township 1, N. Range 1 W. that lies between R. of W. of O. S. L. and Utah Northern Ry. and the R. G. W. Ry. Said R. of W. being 50 feet distant from center of track of said railway, the said portion of said lot 2 running from north to south of said lot, Salt Lake Meridian. Containing one acre.
Pursuant to sale made Dec. 21, 1904 for taxes 1904 assessed to Joseph Miller.
Marginal Note: See Tax Book "I" page 29, line 8.

79 *Kind of Instrument, Quit-claim Deed.*

Joseph Morris and Emily Morris, His Wife,
to
The Salt Lake Investment Co., a Corporation.

Item No. 26.
Filed Sept. 30, 1909.
Recorded in Book "7-U" of Deeds. Page- 500-1.
Dated Sept. 18, 1909.
Consideration, $500.00.
No. of Witnesses one.
Acknowledged O. K.

Description.

All that portion of lot 2, Section 23, of Township 1 North of Range 1 West, Salt Lake Meridian, that lies between the R. of W. of the O. S. L. and Utah Northern Ry. and the R. G. W. Ry. Said R. of W. being 50 feet distant from center of track — said Railways. The said portion of said lot 2 running from north to south of said lot. Containing 1 acre of land, more or less.

Kind of Instrument, Decree.

In the District Court of 3d Judicial District in and for the County of Salt Lake, State of Utah.

THE SALT LAKE INVESTMENT COMPANY, a Corporation, Plaintiff,
v.
J. M. NELSON, et al., Defendants (Including Salt Lake County, a Mun. Corp.; Jos. Morris, the Unknown Heirs of Joseph Morris).

Item No. 27.
Filed Mar. 11, 1910.
Recorded in Book "7-W" of Deeds, Page- 341-3.
Dated Mar. 8, 1910.
Consideration —.
No. of Witnesses —.
Acknowledged —.
Certified O. K.

Description.

* * * It is hereby ordered, adjudged and decreed that the plaintiffs have judgment as prayed for in its complaint against said defendants and each and all of them, and all persons claiming under or pretending to claim said premises, or any part thereof, through or under said defendants, or either of them, are hereby adjudged and decreed to have no interest whatever in said premises or any

part thereof, and their said claims are hereby adjudged and decreed to be invalid and groundless, and that the plaintiff be, and it is hereby declared and adjudged to be the true and lawful owner of the lands described in the complaint, and hereinafter described, and every part and parcel thereof, and that its title thereto is adjudged to be quieted against all claims, demands or pretensions of said defendants, or either of them, who are hereby perpetually estopped and enjoined from setting up any claim thereto, or any part
80 thereof, adverse to the plaintiff.

Said lands are described as follows: All that portion of lot 2, Section No. 23, Township 1, North of Range 1, West, Salt Lake Meridian, that l-es between the right of way of the Oregon Short Line Railway Company, the Utah Northern Railway Company and the Rio Grande Western Railway Company. Said right of way being 50 feet distant from center of tracks of said railroads; the said portion of said lot 2 running from North to South of said lot. Containing one acre more or less (and other property).

C. W. MORSE, *Judge.*

81 *Abstract Certificate.*

32-34 South Main.

#11094.

STATE OF UTAH,
County of Salt Lake, ss:

I, Gustave H. Backman, Licensed Abstractor in and for said county, duly appointed and qualified as provided by law, do hereby certify that the foregoing abstract consisting of entries numbered from one (1) to twenty-seven (27), both inclusive, is a true and correct abstract of all instruments in writing of record in the office of the County Recorder in and for said county, referring to, and affecting the title of, in and to that certain piece or parcel of land, situate lying and being in the county and state aforesaid, and bounded and described as follows, to-wit:

All that portion of lot 2, in Section 23, Township 1 North of Range 1 West, Salt Lake Meridian, that lies between the right of way of the Oregon Short Line and Utah Northern Railway and the right of way of the Rio Grande Western Railway Company.

I further certify, that I have examined the records of the clerk of the District Court of the Third Judicial District, in and for the State of Utah, and that no subsisting judgments appear of record therein, against any of the owners of said property, entered therein within eight years last past. And no judgments appear of record in the U. S. Circuit Court of the Eighth Circuit, in and for the District of Utah, nor in the U. S. District Court, in and for the State of Utah, against any of said owners.

Also that all taxes regularly assessed against said property have

been duly paid, as appears from search of the records of the Office of the County Treasurer of said County, except as shown in the abstract.

Witness my hand and seal this fifteenth day of March 1911 at 8:55 a. m.

[SEAL.] G. H. BACKMAN,
Licensed Abstractor.

82 *Declaratory Statement for Cases Where the Land is not Subject to Private Entry.*

1932.

I, Malcolm Macduff, of Salt Lake Co., U. T., being the head of a family and having declared my intention to become a citizen of the United States,—have, on the 10th day of June, A. D. 1869, settled and improved the N. E. ¼ of S. E. ¼ and S. E. ¼ of N. E. ¼, and Lots 2 and 3 of section number—23—in township number—1 North—, of range number —one West—, in the district of lands subject to sale at land office at Salt Lake City, U. T. and containing —166 90/100—acres, which land has not yet been offered at public sale, and thus rendered subject to private entry, and I do hereby declare my intention to claim the said tract of land as a preemption right, under the provisions of said act of 4th September, 1841.

Given under my hand this 21st day of July, A. D. 1869.

MALCOLM MACDUFF.

In the presence of
F. RALEIGH.

I certify that this is a true and exact copy of the document #1932 now in file in my office.

E. D. R. THOMPSON, *Register.*

Exhibit "B" Salt Lake Inv. Co. v. O. S. L. R. R. Co. C. C.

83 J. S. P. 1—480 A. M.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., April 23, 1901.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original on file in this department.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.] E. A. HITCHCOCK,
Secretary of the Interior.

Ex. 1. S. L. Inv. Co. v. O. S. L. (CC).

84 Department of the Interior. Mar. 9, 1871.

UTAH CENTRAL RAILROAD CO'S OFFICE,
SALT LAKE CITY, U. T., February 22, 1871.

At a special meeting of the Utah Central Railroad Company (representing over three-fourths of the stock) held at Salt Lake City, U. T., February 21, 1871, called to consider the terms of an Act of Congress entitled "An Act Granting to the Utah Central Railroad Company a right of way through the public lands for the construction of a railroad and telegraph" approved December 15, 1870, the following named directors of said company being present, Brigham Young, Sen'r President, William Jennings, Vice-President, Feramorz Little, General Superintendent, and Christopher Layton, act above titled was read, approved, and a committee appointed to draft resolutions thereon, which were then and there reported as follows:

Resolved, that the Utah Central Railroad Company hereby agree to accept the terms, conditions and impositions of the Act of Congress entitled "An Act Granting the Utah Central Railroad Company a right of way through the public lands for the construction of a railroad and telegraph" approved December 15, 1870.

2. That in accordance with one of the requirements of the first section of said act, a map exhibiting the line of the Utah Central Railroad, as it has been located and constructed, be forwarded without delay to the Secretary of the Interior.

3. That in accordance with section 4 of said Act a copy of these resolutions be served on the President of the United States to signify the acceptance by the Utah Central Railroad Company of the
85 terms, conditions and impositions of said act.

These resolutions were read and unanimously adopted.

BRIGHAM YOUNG, *President.*

I hereby certify that the above is a true copy of the resolutions, and of the minutes of the meeting specified above, as recorded in the U. C. R. R. Co's Book of Record.

[COMPANY'S SEAL.] GEORGE SWAN, *Secretary.*

86 UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., June 5, 1903.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original of record in this Department.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed the day and year first above written.

[SEAL.] E. A. HITCHCOCK,
Secretary of the Interior.

Exhibit 2 S. L. Inv. Co. v. O. S. L. (CC.)

87 DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., 10 Mar., 1871.

SIR: I have the honor to acknowledge the receipt, by reference from the President, of acceptance by the Utah Central Railroad Company of the terms and impositions of the Act of Congress of 15, December, 1870, granting to that company a right of way through the public lands.

Very respectfully, your ob't servant,
C. DELANO, *Secretary.*

Hon. Wm. H. Hooper, Delegate from Utah, House of Representatives.

88 UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., January 18, 1913.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed papers are true copies of the originals as they appear on the records and files of the department.

In testimony whereof, I have hereunto subscribed my name caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.] LOUIS C. SAYLIN,
Assistant Secretary of the Interior.

Ex. 3. S. L. Inv. Co. v. O. S. L. (C. C.)

89 (Copy.)

Department of the Interior.

Received M'ch 7, 1871.
Dated M'ch 6, 1871.
From Hon. W. H. Hooper, President.

Subject.

Submits for approval map of Utah Central R. R. with a copy of the act of Dec. 15, 1870, granting the Co. the right of way thro the public lands.

Action.

Advised him map was not certified and could not be accepted. M'ch 8, '71.
Advised of acceptance of map.
M'ch 30, '71.

90 (Copy.)

FORTY-FIRST CONGRESS U. S.,
HOUSE OF REPRESENTATIVES,
WASHINGTON, D. C., M'ch 6, 1871.

Hon. Columbus Delano, Secretary of the Interior.

SIR: By the first section of an act granting to the Utah Central Railroad a right of way through the public lands &c., it is made the duty of the said Railroad Company to file with you a map of the line of said road, to be approved by you.

I have the honor to transmit herewith a map forwarded by the said Railroad Company for that purpose and beg that you will advise me of your receipt and approval of the same.

Very respectfully your ob'd't servant,

W. H. HOOPER.

91 (Copy.)

Jno. B. B. Ldgt. R. R.

March 30, 1871.

SIR: The map exhibiting the line of the Utah Central Railroad "as the same has been located and constructed," required by the Act of December 15th 1870 to be filed in this Department, was received on the 7th instant. You furnished yesterday certificate of the officers of the company for the better identification of said map. I have caused it to be attached thereto.

The map having been filed within the time required by law, is hereby approved.

Very respectfully your ob'd't servant,

W. T. OTTO,
Acting Secretary.

Hon. W. H. HOOPER,
Delegate from Utah.

Washington, D. C.

92 In the Supreme Court of the State of Utah.

* * * * * * *

Præcipe for Transcript on Writ of Error.

* * * * * * *

93 17. Clerk will omit from transcript Plaintiff's Exhibits Nos. 4 to 10 inclusive, it being expressly conceded and admitted that Defendant's Exhibit No. 4 is the properly certified map mentioned in Defendant's Exhibits Nos. 1, 2, and 3, showing the original and permanent line of the Utah Central Railroad, constructed across Lot 2, as claimed by defendant, and it being further

expressly conceded and admitted that the defendant is and was the successor in title and interest of the Utah Central Railroad, as claimed by it to be.

* * * * * * *

94 M. E. WILSON &
E. A. WALTON,
Attorneys for Plaintiff in Error.

Copy received this 25th day of June, 1915.
SMITH, LYLE, WILLIAMS,
Attorneys for Defendant in Error.

Filed Jun- 25, 1915. H. W. Griffith, Clerk Supreme Court, Utah.

95 In the Supreme Court of the State of Utah, Regular May Term, 1914, May 21, 1914.

* * * * * * *

This cause coming on regularly for hearing, was argued by Mr. H. B. Thompson in behalf of appellant; by Mr. E. A. Walton and Mr. M. E. Wilson in reply, was submitted, and by the court taken under advisement.

October Term, December 1, 1914.

Title of Court and Cause.

Judgment.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here ordered and adjudged that the judgment of the court below herein be, and the said is, hereby, reversed, and the cause is remanded to said court with directions to set aside the judgment entered and to enter a judgment in favor of defendant and appellant quieting the title in it as prayed in its counterclaim. Appellant to recover costs.

96 In the Supreme Court of the State of Utah.

* * * * * * *

STRAUP, *J.*:

This is an action, as stated by appellant in its brief, "to recover compensation for the taking of private property for public use." It is charged in the complaint that the plaintiff is the owner and entitled to the possession of the property, fully described, containing about one acre of land situate in Salt Lake City and County; that at the time of the taking there was on the land a flowing spring discharging hot mineral water of the value of $20,000.00; and "that on or about the first day of April A. D. 1906, the defendant,

without right or authority of law, and without instituting any eminent domain or condemnation proceedings, and without the consent of the plaintiff herein, entered upon said land above described and occupied the same, and from time to time proceeded to and did dump great quantities of earth, rock, gravel and other substances upon said land, and constructed upon certain portions of the same its railroad tracks, and proceeded to and did occupy the said land, and still does occupy the same for the purpose of operating its railroad over and upon said land. That in dumping said earth, rock, gravel and other substances upon said land, in constructing said railroad tracks thereon, and in continuing to occupy the same, as aforesaid, the defendant has absolutely destroyed and prevented the flow of the water from said spring and has absolutely destroyed the existence of said spring in such manner as to cause the waters naturally arising and flowing out of said spring to seek other channels and not to arise upon the aforesaid lands of the plaintiff hereinbefore described; and that in its occupation of said land
97 as aforesaid the defendant has thereby wrongfully appropriated said land to its own use and benefit. And that by reason of the matters and things herein stated and said wrongs done and committed by the said defendant, plaintiff has been damaged in the sum of $20,000.00."

The defendant, by its answer, admitted entering upon and taking possession of the land for railroad purposes, at about the time alleged in the complaint, without the consent of the plaintiff and without the institution of eminent domain or condemnation proceedings; and alleged that it continuously and exclusively thereafter occupied, possessed and used it for such purposes. It denied plaintiff's title and right of possession and alleged the action barred by statute of limitations. It further, by way of counterclaim, pleaded title in itself and alleged that neither the plaintiff nor its grantor or predecessor was seized or possessed of the premises within seven years before the commencement of the action; and prayed the title quieted in it.

The case was tried to the court and a jury. The court itself, on the evidence adduced, determined and adjudged that the plaintiff, and not the defendant, was the owner of the property at the time of the alleged taking and that the action was not barred. It, upon instructions, submitted the case to the jury to determine "the compensation, if any, the defendant should pay the plaintiff for the tract of land" in controversy. This was the only question submitted to the jury. They rendered a verdict in favor of the plaintiff for $4,000.

The defendant appeals and urges: That the action is barred; that the defendant has, but the plaintiff has not, shown title; and that error was committed by permitting certain witnesses to express opinions as to value.

The evidence shows the entry and taking to have been in March or April, 1906. The action was commenced in December, 1912, more than six and less than seven years from the taking. The

contention is first made that the action is barred by provisions
98 of *of* Comp. Laws, 1907, Sec. 2877, Subdv. 2, which provide that "an action for waste or trespass to real property" must be commenced within three years. And, if that section is held not applicable, then the further claim is made that the action is barred by the provisions of Sec. 2883 which provide that "an action for relief not hereinbefore provided for must be commenced within four years." The complaint is broad enough to recover on the theory stated by the appellant, "compensation for the taking of private property for public use." The case was tried by both parties, and was without objection submitted to the jury, on that theory. The pleadings admit a taking for a public use and an exclusive and continuous occupation and possession, without the consent of the plaintiff and without the institution of eminent domain or condemnation proceedings. We think in such case neither section referred to is applicable, but that the provisions of Sec. 2860 requiring actions or defenses founded on realty to be commenced within seven years are. By those provisions the action is not barred. Our constitution and statute require compensation to be first made for private property taken for public use; and, where property is entered upon and appropriated to public use without complying with the law, the owner may waive the tort and sue for his just compensation. In such case the action is not barred, except by adverse possession for the required period, here seven years. 2 Lewis, Em. Domain, 3rd ed. Secs. 889 and 967; Tucker v. Chicago, St. P. Minn. & Omaha R. Co., 91 Wis. 576; Lehigh Valley R. R. Co. v. McFarlan, 43 N. J. L. 605; McFarlan v. Morris Canal and Banking Co., 44 N. J. L. 471; Hannun v. Borough of West Chester, 63 Pa. St. 475; Stauffer v. E. Stroudsburg Boro., 215 Pa. St. 143; Galway v. M. E. R. Co. et al., 128 N. Y. 132; In re Clark v. Water Commissioners, 148 N. Y. 1; Land v. Railroad, 107 N. C. 72; Utley v. Railroad Company, 119 N. C. 720. We see nothing in the cited cases of Stockdale v. Railroad, 28 Utah 201; Morris v. Railroad, 36 Utah 14; and O'Neill v. San Pedro Etc. R. Co., 38 Utah
99 475, 114 Pac. 127 which makes against this. Contrary holdings seemingly have been made in other jurisdictions, prominent among them being California and Michigan. Robinson v. So. Cal. Ry. Co., 129 Cal. 8; Williams v. So. Pac. Rd. Co., 150 Cal. 624; Wood v. Railroad Co., 90 Mich. 212. There it has been held that an action to recover damages for the wrongful entry and construction of a railroad without proceedings for condemnation and without the owner's consent is barred by the provisions of the statute prescribing the time in which an action for trespass to real property must be commenced, which, in this jurisdiction, is three years. We think the former are more in harmony with legislative intent and that the statutes applicable to a recovery such as here—compensation for a taking of real property—are those relating to real actions and rights in and to real property. It would seem when one, without the consent of the owner and without legal proceedings or process, enters upon and takes real property, exclusively occupies

and possesses it as his own and permanently appropriates it to his own use and deprives the owner of all rights in or uses to it, he has done something more than the commission of a mere trespass; he has unlawfully seized, exclusively possessed, and permanently taken it.

A witness for the plaintiff, after showing that he had been in the real estate business at Salt Lake City for twenty years or more engaged in buying and selling real estate; that for fifteen or eighteen years he had been acquainted with the land and spring in question and other lands and springs in that vicinity; that he knew of sales that had been made of lands upon which were hot springs; and after describing the land and the spring, the character, quality and volume of water discharged from it, and its situation with respect to other springs, including what is known as Beck's Hot Springs and the Warm Springs, was asked by plaintiff's counsel: "I will ask you from your experience and acquaintance with the land in question and from lands in and about Salt Lake
100 City and the real estate market generally you would have—you could form a somewhat accurate opinion relative to the value of the land described in the complaint and having situated thereon t' is spring that you have described?" This was objected to by the defendant's counsel upon the ground "that no proper foundation has been laid, it not appearing that the witness is familiar with any purchases or sales or values at the time that is material in issue." The objection was overruled and the witness answered "Yes sir." Then, after further showing by him the beneficial and commercial uses to which waters of the character of the spring in question and in that vicinity could be and had been devoted, he was further asked by plaintiff's counsel: "Taking into consideration the fact that there is about an acre of ground described in this complaint and that it had situated on it this spring known as the Hobo Spring bubbling forth this flow of water that you have described, I will ask you what that acre of ground, in your opinion, would be worth with the spring flowing thereon as it was prior to its being filled up or covered over by the defendant company?" This was objected to by the defendant's counsel "as irrelevant, incompetent, immaterial, no proper foundation laid, the witness not qualified." The objection was overruled and the witness answered "from twenty to twenty-five thousand dollars." It is now here argued that the ruling was erroneous because the witness was asked and permitted to give "his own opinion" as to value instead of his opinion as to the "market value." In support of that it is urged that "opinions must be restricted to the fair market value of the land, not the witness' judgment of its value, or its value to the owner. A special value in excess of the market value cannot be shown," citing 13 Ency. Ev. 487; Peoria B. & C. Traction Co. v. Vance, 234 Ill. 36. The rule as stated may well be conceded; but how about the objection? The rule, of course, is, that objections, to be of avail, must be specific. The only specific objection made and the ground upon which it was claimed in the court below the evidence was not re-

ceivable were that "no proper foundation was laid; the wit-
101 ness not qualified." A sufficient and proper foundation was laid to qualify the witness to express an opinion as to the market value. There can be no doubt of that. Nor is that objection here pressed, or even argued. But another not specified in the court below is. It may be that the question was improper, not because the witness was not shown to be qualified, that a sufficient foundation had not been laid, but because it was not sufficiently restricted to market value and permitted the witness to give his opinion of value regardless of the market value. Peoria B. & C. Traction Co. v. Vance, supra. But since no such objection was made or specified in the court below, the defendant is in no position to here complain on that ground. It may well be presumed that had the objection specified the ground here pressed and argued the question would have been so reframed as to call for an opinion as to the market value, or, if not, that the ruling would have been different; for, throughout the whole case, as appears by the record, both parties and the court proceeded on the theory that the true measure of compensation was the market value of the land at the time of the taking. Neither party claimed, nor did the court assume any other or different theory. Then, too, we think whatever error may have been committed, if any, in this respect was cured by the court's charge: It charged: "You are instructed that the issue in this case is as to compensation, if any, that the defendant should pay to the plaintiff for the tract of land described in the pleadings. And in determining such issue the jury is authorized to allow to the plaintiff the market value of said tract of land at the time it was appropriated to its use by the defendant;" and, at the defendant's request, further charged, "You are instructed that the plaintiff's damages are to be measured on a basis of the fair market value of the property at the time as of which the damages are to be determined, and you cannot base your verdict on any expressions of opinion of value unless such opinions were stated to be of the market value."

102 And lastly, the rule governing the competency of opinions is not so strictly applied to questions of value as to many other subjects. Mobile Etc. Rd. Co. v. Riley, 119 Ala. 260. We think this is especially true where, as here, the jury were so fully given and had the benefit of the facts upon which the opinion of the witness was based. We do not think the ruling harmful. Similar questions were asked other witnesses to which similar objections were made, so what has been said applies also to that.

The plaintiff claims title through a patent from the Government to one MacDuff, and through a tax sale and deed; the defendant, by a grant from Congress to its predecessor for railroad purposes. In 1860 Salt Lake City was incorporated by an act of the Territorial Legislature of Utah, and was laid out on exclusively public lands. Its corporate limits, as then established, embraced the land in question. In 1867 the limits were extended, still embracing the land. Under Secs. 2387 to 2390, R. S. U. S., 16 St. L. 183, Salt Lake City was authorized to select and enter upon Government lands, including the premises in question, for the use of its inhabitants, but it did

not exercise that right until in November, 1871, when it made an entry and selection of over 5,700 acres, but not including the land in question. On July 21, 1869, MacDuff filed a preemption declaratory statement to lands including the property here in question. On June 6, 1871, the Government issued a patent to him. By mesne conveyances that title was conveyed to one Joseph Morris in 1890. In 1904 the property, assessed to Morris, was sold to the plaintiff for taxes. On September 22, 1909, a deed, pursuant to the tax sale, was issued and delivered to the plaintiff, and on the 18th of that month Morris and his wife also quit claimed to the plaintiff. Plaintiff paid all the taxes assessed against the property since 1904.

On December 15, 1870, after the MacDuff entry but nearly six months before the patent was issued to him and about eleven months before Salt Lake City exercised its right of entry and selection, Congress granted to the Utah Central Railroad Co., for rail-
103 road purposes, "a right of way through the public lands * * * 200 feet in width on each side of said railroad where it may pass through the public domain," from a point at or near Ogden City to Salt Lake City, Utah Territory. The grant required acceptance and was accepted in February 1871, at which time the Utah Central Railroad Co. filed with the Secretary of the Interior its articles of incorporation and map showing the route of its road, etc. The land in controversy is within 200 feet of the center of the railroad as constructed by the Utah Central Railroad Company in 1870 and within the route as shown by its map. By mesne conveyances and articles of consolidation all the right, title and interest of the Utah Central Railroad Co. were conveyed to the defendant.

By act of Congress (1841) Sec. 2858, R. S. U. S., Ch. 16, 5 St. L. 455, it, among other things, was provided that "lands included within the limits of any incorporated town, or selected as the site of a city or town" and "lands actually settled and occupied for purposes of trade and business and not for agriculture" were not subject to preemption rights. It is stipulated that the land in controversy "has never been actually settled upon, inhabitated, improved and used for public and municipal purposes, nor devoted to any public use of the town of Salt Lake City." The lands, when MacDuff made and filed his declaratory statement in 1869, were then within the corporate limits of Salt Lake City and because of the act just referred to were then not subject to rights of preemption. By reason of this the appellant asserts the MacDuff entry and the patent thereafter issued to him in 1871 are void. To support this it relies on Burfenning v. Chicago, St. P. Etc. Ry. Co., 163 U. S. 321 and other cases cited in its brief. That case holds that a homestead patent for lands within the corporate limits of the city of Minneapolis was invalid by reason of such provisions. The plaintiff in effect concedes that the MacDuff entry and the patent issued thereon would be invalid were it not for the act of Congress of March
104 3, 1877, 19 St. L. 392. By that act it is provided:

"The existence or incorporation of any town upon the public lands of the United States shall not be held to exclude from

preemption or homestead entry a greater quantity than 2,560 acres of land or the maximum area which may be entered as a townsite under existing laws unless the entire tract claimed or incorporated as such townsite shall, including and in excess of the area above specified, be actually settled upon, inhabited, improved and used for business and municipal purposes. * * * Where entries have been heretofore allowed upon lands afterwards ascertained to have been embraced in the corporate limits of any town, but which entries are or shall be shown * * * to include only vacant unoccupied lands of the United States not settled upon or used for municipal purposes, nor devoted to any public use of such town, said entries, if regular in all respects, are hereby confirmed and may be carried into patent."

The act has been held applicable to such cities as Salt Lake, and other cities and towns, laid out exclusively on the public lands of the United States, and not to such cities, as Minneapolis, laid out mostly on private lands, but including lands of the United States. Houlton v. Chicago, St. P., M. & O. R. Co., 86 Wis. 59. Salt Lake City was, and it is general knowledge that other cities and towns of Utah and the west were, incorporated and laid out on exclusively public lands covering rather extensive areas, thereby withdrawing the lands embraced therein from preemption entry and sale under the general land laws. The authorities hold that it, among other things, was intended by that act to remedy that evil and to permit preemption entries to be made on Government lands though within the corporate limits of a city or town (Vilas et ux. v. Algar, et al., 109 Fed. 519; Alger v. Hill, 2 Wash. 344, 27 Pac. 922), and speak of it in that connection as a curative act. Thus, the further claim is made by the plaintiff that such act operated to confirm such entries as the MacDuff entry and as a ratification of the patent issued thereon. The defendant, however, asserts that Congress having granted its predecessor a present right in and to the lands in December 1870, at a time when the MacDuff entry was of no effect and before the patent had been issued thereon, to now hold the act of 1877 as confirming or ratifying the MacDuff entry is to divest it of a vested right acquired by it before the act was
105 passed. If the lands were included or embraced within the grant to the defendant's predecessor, then of course the subsequent act of 1877 does not affect it. Whether they were or were not so included is the decisive question. As has been seen the defendant's predecessor was not granted any specifically described lands. It was granted a right of way through only "public lands * * * through the public domain," from a point at or near Ogden to Salt Lake City. The plaintiff claims that when that grant was made the lands here were not public lands because they then were within the corporate limits of Salt Lake City, and subject to selection and entry by that city. The question as to what lands are public lands within the meaning of grants similar to that under consideration has been before the Supreme Court of the United States in a number of cases. That court, in the case of U. P. R. R. Co. v. Harris, 215 U. S. 386, said: "The grant of the

right of way was 'through the public lands.' What is meant by 'public lands' is well settled. As stated in Newhall v. Sanger, 92 U. S. 761: 'The words public lands are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws,'" citing Barker v. Harvey, 181 U. S. 481 and Minnesota v. Hitchcock, 185 U. S. 373. See also Bardon v. No. Pac. Rd. Co., 145 U. S. 535; Whitney v. Taylor, 158 U. S. 85; Nelson v. No. Pac. Ry. Co., 188 U. S. 108. Though these lands were within the corporate limits of Salt Lake City still the ownership of them was in the Government; and until they were entered upon and selected by Salt Lake City, Congress had the undoubted right to sell and convey them. 32 Cyc. 841. And if they were in fact granted by Congress to the defendant's predecessor in December, 1870, that ends the inquiry. But here, as in the case of U. P. R. R. v. Harris, supra, the grant was a right of way only "through the public lands," which the Supreme Court of the United States said meant only such lands "as are subject to sale or other disposal under general laws." How were such lands as these, agricultural lands, subject to sale or other disposal "under general laws?" The plaintiff answers, only under the provisions of the general preemption laws; and, as is argued, since they were within the corporate limits of Salt
106 Lake City, and under the provisions of the act of 1841 not subject to preemption rights, they therefore were not "subject to sale or other disposal under general laws," and therefore were not public lands, and hence not embraced in the grant to the defendant's predecessor. No other general laws are pointed to under which the lands were subject to sale or other disposal. The defendant does not claim they were sold or conveyed to its predecessor under any general law, but by a special act of Congress.

Plaintiff's conclusion seems plausible, and though we were inclined to adopt it, yet, we are of the opinion that the case of Moon v. Salt Lake City, 27 Utah 435, is contrary to such a holding. In that case—a case between different parties—this court, having under consideration the identical grant to the defendant's predecessor, said: "The fact that the land in controversy was situated within the corporate limits of the city is immaterial, since it then constituted a part of the public domain." Of course the term "public domain" is equivalent to the term "public lands." Barker v. Harvey, supra. It thus was there adjudged that lands similar to these, though within the corporate limits of Salt Lake City and though not subject to preemption rights, were, nevertheless, "a part of the public domain." It, however, is argued that in the Moon case the parties and the court assumed that the lands there were public lands; and since the judgment was affirmed the case is not a precedent as to that point, citing Larson v. First National Bank, 92 N. W. 729; Bratsch v. The People, 195 Ill. 165. It is true, as held in those cases, that as a judgment will not be reversed for errors not presented and not argued, a decision affirming a judgment is of no controlling force in a subsequent case as to any question, though involved, but not argued or presented and left unnoticed or not passed on by the court. While the briefs on file in the Moon case show that the

question of whether the lands there were or were not public lands was not controverted nor argued, yet it seems the point was not "left unnoticed" by the court. It was involved, and while
107 there was not much said about it, and while the opinion in such respect is chiefly devoted to the question of whether the words in the grant "to Salt Lake City" refer to or embrace lands within the limits of the city, or lands only to the limits of the city, nevertheless, the point here under consideration was noticed by the court and was, as we think, decided. Now, if that holding is in conflict with the holding of the Supreme Court of the United States it of course would be our duty to follow the latter, for the question involves a federal question, the construction of acts of Congress. (11 Cyc. 752.) We, however, have not been referred to any decision of the Supreme Court of the United States where, as we think, the point has been directly decided by that court. It is only by analogy, and deductions from language used by that court in the cases referred to, that the claim is made that the lands here, being within the corporate limits of the city and subject to entry and selection by that city were not public lands when the grant was made to the defendant's predecessor. And until the point as to whether such lands are or are not public lands is directly decided by the Supreme Court of the United States we feel bound by the decision of this court. Hence we hold the lands here were public lands when the grant was made to the defendant's predecessors, and hence were included or embraced within that grant.

We are also of the opinion that the plaintiff has shown no title by the tax sale and deed. The property was not assessed to the defendant or its predecessor, the real owner. It was assessed to Morris, who was not the owner. A sale for taxes upon such an assessment, and a deed issued in pursuance thereof, have no binding effect as against the real owner.

Our conclusion, therefore, is that the defendant, and not the plaintiff, at the commencement of the action and at the time of the alleged taking, was, the owner and entitled to the possession of the lands in question, and, therefore, its motion for a directed verdict in its favor ought to have been granted; and that the court erred in
108 rendering judgment for the plaintiff. The judgment of the court below is reversed; and since the facts respecting title to the lands are not in dispute, and since our ruling is based, as it is, upon the grant by Congress to the defendant's predecessor, we see no good to be accomplished by remanding the case for a new trial. It therefore is remanded with directions to set the judgment aside and to enter a judgment in favor of the defendant quieting the title in it as prayed in its counterclaim. Costs to the defendant.

We concur:

McCARTY, *J.*
FRICK, *J.*

109 *Respondent's Petition for Rehearing.*

Comes now the respondent and respectfully prays the court to grant a re-hearing and re-argument of this cause, on the following grounds, namely:

2. This court has erred in its opinion and decision in holding that the defendant's motion for non suit should have been granted even though the holding be correct that the motion from a directed verdict should have been granted.

110 3. The court has erred in its opinion and decision in denying the validity of the patent to Malcolm McDuff, a predecessor in title to the plaintiff, and on which patent plaintiff relied, and in not giving effect to the Act of Congress of March 3, 1877, 19 Statutes at Large, 392, and in denying the validity of the receiver's receipt to Malcolm McDuff, being item 1 of plaintiff's Exhibit "A."

4. The court has erred in its decision in this, that the court has given effect to sections 2387 and 2390 inclusive of the U. S. Revised Statutes, which sections in and of themselves operated to limit the grant to the Utah Central Railroad Company to lands other than the premises in question.

5. The court has erred in ascribing to the case of Moon vs. Salt Lake City (27 Utah, 435) the effect of controlling a decision here.

111 M. E. WILSON,
E. A. WALTON,
Attorneys for Respondent.

I hereby certify that in my opinion there is good reason to believe that the judgment herein is erroneous and that the same ought to be re-examined.

E. A. WALTON,
One of Attorneys for Respondent.

112 In the Supreme Court of the State of Utah.

Regular February Term. May 8, 1915.

The original opinion as announced and filed read that the defendant's "motions for a nonsuit and for a directed verdict in its favor ought to have been granted." On an application for a rehearing, the opinion was so modified as to read that the "motion for a directed verdict ought to have been granted." With such modification the petition for a rehearing was denied.

113 In the Supreme Court of the State of Utah.

Filed May 21, 1915. H. W. Griffith, Clerk Supreme Court, Utah.

Petition for Writ of Error.

Comes now The Salt Lake Investment Company, a corporation, the plaintiff in error above named, and respectfully shows unto the courts:—

1.

That the said The Salt Lake Investment Company, a corporation, brought an action against said Oregon Short Line Railroad Company, a corporation, in the District Court of the Third Judicial District, State of Utah, in and for Salt Lake County, on August 28th, 1912, to recover the sum of $20,000, and costs of suit, and such other relief as justice might require.

2.

That in and by its complaint and amended complaint therein said plaintiff alleged that plaintiff and defendant were corporations duly organized and existing under the laws of the State of Utah, and that plaintiff at all times mentioned was the owner and entitled to the possession of that certain tract of land situated in Salt
114 Lake County, State of Utah, described as follows, to-wit:—

"Beginning at a point on meander line number six (6) one hundred and forty-five (145)) feet north of 30° east of the intersection of courses five (5) and six (6) of the meander lines of Hot Springs Lake in Section twenty-three (23) Township One (1) North of Range One (1) West, Salt Lake Meridian:

Running thence southerly along the east boundary line of the D. & R. G. W. Railway's right of way; and forty feet east and parallel with the center line of the said railway's track as now constructed three hundred and seventy-five (375) feet to said meander line number five (5); thence southerly on said meander line number five (5) to the west boundary line of the O. S. L. R. R. right of way as recorded in Book "D," of Deeds, page 595, of the records of Salt Lake County; thence northerly along the west boundary line of said right of way of said O. S. L. R. R. and fifty (50) feet west and parallel with the center line of said O. S. L. R. R. track to course number six (6) of the meander lines of Hot Springs Lake; thence southwesterly on said meander line number 6 to point of beginning. Being a part of Lot Two (2) of Section Twenty-three (23) Township One (1) North of Range One (1) West of Salt Lake Meridian, anc containing one acre of land, more or less."

That before and up to the time of the commission of the acts complained of there existed on said land a flowing spring discharging mineral water of great value and that said lands were of the value of twenty thousand dollars.

That on or about the first day of April, 1906, the defendant, without right or authority of law and without instituting any eminent domain or condemnation proceedings, and without the consent of the plaintiff, entered upon said land and occupied the same, constructed its railroad tracks thereon, destroyed said spring, and proceeded to occupy and still occupies the same for the purpose of operating its railroad thereover, and thereby wrongfully appropriated said land to its own use and benefit to the plaintiff's damage in the sum of $20,000.00.

3.

The defendant answered admitting its said corporate existence and that prior to the first day of April, 1906, it entered upon and took possession of said premises, and ever since has had the continuous and exclusive possession and occupation of said premises and occupied the same for the purpose of operating its railroad thereover, and that said entry was without the consent of plaintiff
115 and without the institution of eminent domain or condemnation proceedings; and defendant denied the other allegations of the complaint.

Defendant further alleged that the cause of action was barred by the provisions of section 2883 Compiled Laws of Utah, 1907, and subdivision 2 of Section 2877 Compiled Laws of Utah, 1907.

For further answer and by way of cross-complaint the defendant alleged that on the 15th day of December, 1870 said Lot 2 of Section 23, Township 1 North of Range 1 West, Salt Lake Meridian in the district of lands subject to sale, at Salt Lake City, Utah, was public lands of the United States; that prior thereto, to-wit, on January 1, 1870, the Utah Central Railroad Company, a corporation, under the laws of the territory of Utah, had constructed and completed its line of railroad extending from Ogden City, Utah, to Salt Lake, Salt Lake County, Utah, at a point near the intersection of Third West Street and South Temple street in said Salt Lake City, and that said line was then so constructed over and across said Lot 2 of Section 23, the original location thereof being shown by red line and marked "Original main line and center line of R. of W." on the map attached to the answer marked Exhibit A and made a part thereof. That on said 15th day of December, 1870, an Act of Congress of the United States was duly approved and then became a law by the terms of which the United States granted a right of way to the said The Utah Central Railroad Company for its railroad and telegraph line from a point at or near Ogden City to said Salt Lake City, in the State of Utah to the extent of two hundred feet in width on each side of said railroad where it might pass through the public domain. That the defendant is the successor of said Utah Central Railroad Company and is now the owner, in the possession and entitled to the possession of all that portion of the said Lot 2, extending 200 feet on each side of the line of the said Utah Central Railroad

as originally located and constructed over and across the said
116 tract of land. The answer then described the said tract of land which description includes the aforementioned description of the plaintiff.

The defendant further alleged that neither the plaintiff its ancestor, grantor nor predecessor was seized or possessed of the said premises, or any portion thereof, within seven years before the commencement of this action; and it prayed that the said plaintiff take nothing by its said amended complaint, and for a decree quieting the defendant's title in and to said premises, and other equitable relief.

4.

That said cause came on to be heard before said District Court and a jury on the 8th day of September, 1913, and it appeared by the undisputed evidence that in 1860 Salt Lake City was incorporated by an act of the Territorial Legislature of Utah, embracing the land and premises in question; that said Salt Lake City, in November, 1871, made an entry and selection of 5,730.45 acres, not including the land in question; On July 21st, 1869 Malcolm McDuff the predecessor in title and intermediate grantor of plaintiff, filed a pre-emption declaratory statement to lands including the property in question; on June 6, 1871, the United States Government issued its patent for said lands to him. It appeared further by undisputed evidence that on December 15, 1870, after the McDuff entry but before the patent was issued to him, and a few months before Salt Lake City exercised its right of entry and selection, the United States Congress granted to the Utah Central Railroad Company for railroad purposes a right of way through the public lands two hundred feet in width on each side of said railroad where it passed through the public domain from a point at or near Ogden City to Salt Lake City, Utah Territory, and that said grant was accepted by said railroad in February, 1871; and that the defendant was the successor in interest of the said Utah Central Railroad Company.

117 5.

The said District Court found the plaintiff to have the better title and so directed the jury, and the jury returned a verdict in favor of the plaintiff for the sum of $4,000.00, for which judgment was entered on the 12th day of September, 1903.

Thereupon the defendant in error prosecuted its appeal from said judgment to the Supreme Court of the State of Utah, and assigned as error, among other things, that the court erred in denying the motion of the defendant for a directed verdict, upon the grounds, among others, that the title proved in the defendant was superior to the title proved by the plaintiff.

That the Supreme Court of the State of Utah on the 1st day of December, 1914, entered its judgment reversing the judgment of the District Court, and holding that the defendant's motion for a nonsuit and for a directed verdict ought to have been granted, and remanding the cause with a direction to set the judgment

aside and to enter a judgment in favor of the defendant quieting its title as prayed.

That thereafter and within due time the plaintiff filed in said Supreme Court its petition for rehearing, and thereupon and on the 8th day of May, 1915, the court modified its opinion by eliminating therefrom its conclusion that the defendant's motion for a nonsuit ought to have been granted; and in other respects denied the said petition.

6.

That the Supreme Court of the State of Utah in deciding said cause and in reversing said judgment rested its conclusion wholly upon its construction of the Act of Congress of December,
118 15, 1870, granting a right of way to the Utah Central Railroad Company, and sections 2387 to 2390 inclusive revised statutes of the United States; and did not give effect to said sections 2387 to 2390 inclusive the revised statutes of the United States; and did not give effect to the Act of Congress of March 3, 1877, "An act Respecting the Limits of Reservations for Townsite upon the Public Domain"; and did not give effect to the receiver's receipt and the patent of the United States to Malcolm McDuff.

7.

In this judgment of the Supreme Court of the State of Utah, your petitioner by its counsel is advised and verily believes, and therefore states, that error was committed to its great detriment and injury, which will more fully appear from the assignment of errors which is filed herewith.

Wherefore, your petitioner prays that a Writ of Error may be issued to the Supreme Court of the State of Utah, in this behalf, for the correction of the errors complained of and that a transcript of the record and proceedings and papers of this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 21 day of May, A. D. 1915.

THE SALE LAKE INVESTMENT COMPANY,
A Corporation, Petitioner,
By M. E. WILSON,
E. A. WALTON,
Its Attorneys.

119 Filed May 21, 1915. H. W. Griffith, Clerk Supreme Court Utah.

In the Supreme Court of the State of Utah.

Assignment of Errors.

Comes now The Salt Lake Investment Company, a corporation, petitioner for a Writ of Error to the Supreme Court of the State of

Utah, by M. E. Wilson and E. A. Walton, its attorneys, and says:
That said Supreme Court of the State of Utah, in rendering its decision and judgment in this cause, erred in the following particulars, to-wit:

1.

The Supreme Court of the State of Utah erred in reversing the judgment of the District Court.

2.

The Supreme Court of the State of Utah erred in its decision in this cause in not giving effect to the Act of Congress of March 3rd, 1877 entitled "An Act respecting the limits of reservations for townsite upon the public domain" (19 Stat. at Large, 392).

3.

The Supreme Court of the State of Utah erred in its decision in this cause in not giving effect to the pre-emption entry of Malcolm McDuff, the predecessor in title of the plaintiff, and in not
120 giving effect to and in denying the validity of the patent to the premises in question issued by the United States Government to Malcolm McDuff.

4.

The Supreme Court of the State of Utah erred in its decision in this cause in not giving effect to sections 2387, 2388, 2389 and 2390, of the Revised Statutes of the United States.

5.

The Supreme Court of the State of Utah erred in its decision in this cause in ascribing to the case of Moon v. Salt Lake County (27 Utah, 435) the force of paramount authority.

6.

The Supreme Court of the State of Utah erred in its decision in holding that the premises in question were "public lands" within the purview of the act of Congress granting a right of way to the Utah Central Railroad Company.

7.

The Supreme Court of the State of Utah erred in not affirming the judgment of the District Court.

M. E. WILSON,
E. A. WALTON,
Attorneys for Plaintiff in Error.

Copy received this — day of —— A. D. 1915.

——— ———,
——— ———,
Attorneys for Defendant in Error.

121 Filed May 21, 1915. H. W. Griffith, Clerk Supreme Court, Utah.

In the Supreme Court of the State of Utah.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, which is in the Supreme Court of the State of Utah, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Salt Lake Investment Company, a corporation, as plaintiff and the Oregon Short Line Railroad Company, a corporation, as defendant, wherein was drawn in question the construction of statutes of the United States, and wherein was drawn in question the validity of statutes of and authority exercised under the United States, and wherein the said plaintiff claimed the title to the premises and property in question under the statutes of and authority exercised under the United States, and the decision
122 of the said Supreme Court of the State of Utah was against the title and right under the statutes and authority exercised under the United States specially set up and claimed by the said plaintiff, The Salt Lake Investment Company, a corporation, a manifest error has happened to the great damage of the said Salt Lake Investment Company as by its complaint appears, we being wiling that error, if any there hath been, should be duly accorded and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 20th day of July, 1915, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, this 21 day of May, A. D. 1915.

[Seal United States District Court, District of Utah.]

JERROLD R. LETCHER,
Clerk of the United States District Court of Utah.

Allowed by D. N. Straup Chief Justice of the Supreme Court of the State of Utah, May 21st, 1915.

D. N. STRAUP,
Chief Justice Supreme Court of Utah.

123 In the Supreme Court of the State of Utah.

Bond on Writ of Error.

Know all men by these presents: That we, the Salt Lake Investment Company, a corporation, as principal, and Utah Savings and Trust Company, a corporation of Utah, having its principal place of business at Salt Lake City, Salt Lake County, State of Utah, as surety, are held and firmly bound unto the defendant in error, Oregon Short Line Railroad Company, a corporation, in the full and just sum of Five Hundred Dollars ($500.00), to be paid to the said defendant in error, its attorneys, successors and assigns, to which payment well and truly to be made, we bind ourelves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 20th day of May, in the year of Our Lord One Thousand Nine Hundred and fifteen.

Whereas, lately in the Supreme Court of the State of Utah in a suit pending in said court between the Salt Lake Investment Company, a corporation, as plaintiff, judgment was rendered against the said Salt Lake Investment Company and the said Salt
124 Lake Investment Company having obtained a Writ of Error and filed a copy thereof in the clerk's office in said court to reverse the judgment in the said suit, and a citation directed to the said Oregon Short Line Railroad Company, citing and admonishing it to be at a session of the Supreme Court of the United States at Washington on the — day of July, A. D. 1915;

Now, the condition of the above obligation is such that if the said the Salt Lake Investment Company, a corporation, shall prosecute the said writ of error to effect and answer all damages and costs if it fail to make its said plea good, then said above obligation to be void, otherwise to remain in full force and virtue.

THE SALT LAKE INVESTMENT COMPANY,
By A. T. MOON, [SEAL.]
Its President and Manager, Principal.
[SEAL.] UTAH SAVINGS & TRUST COMPANY,
By F. M. MICHELSEN, [SEAL.]
Secretary, Surety.

STATE OF UTAH,
County of Salt Lake:

F. M. Michelsen being first duly sworn on oath, deposes and says that he is the Secretary of the Utah Savings & Trust Company, a corporation of Utah, and that he is duly authorized to execute and deliver the foregoing obligation; that said company is authorized to execute the same and has complied in all respect with the laws of Utah in reference to becoming sole sureties upon bonds,
125 undertakings and obligations.

F. M. MICHELSEN.

Subscribed and sworn to before me this 20th day of May, 1915.

[SEAL.] WILLIAM VORKINK,
Notary Public.

My commission expires Dec. 14th, 1916.
Approved May 21st, 1915.

D. N. STRAUP,
Chief Justice of the Supreme Court of the State of Utah.

Filed May 21, 1915.
H. W. GHIFFITH,
Clerk Supreme Court, Utah.

126 Filed May 21, 1915. H. W. Griffith, Clerk Supreme Court, Utah.

Filed, on return, May 24, 1915. H. W. Griffith, Clerk Supreme Court, Utah.

In the Supreme Court of the State of Utah.

Citation.

UNITED STATES OF AMERICA, *ss:*

To the Oregon Short Line Railroad Company, a Corporation:

You are hereby cited and admonished to appear before the Supreme Court of the United States at Washington within Sixty days hereof, pursuant to the Writ of Error filed in the clerk's office of the Supreme Court of the State of Utah, at Salt Lake City, Utah, wherein said The Salt Lake Investment Company, a corporation, is plaintiff in error, and said Oregon Short Line Railroad Company, a corporation, is defendant in error, to show cause if any there be why the said judgment rendered against the said plaintiff in error as in said writ of error named should not be corrected and why speedy justice should not be done to the party in that behalf.

Witness the Hon. D. N. Straup, Chief Justice of the Supreme Court of the State of Utah, this 21st day of May, A. D. 1915.

D. N. STRAUP,
Chief Justice of the Supreme Court of the State of Utah.

127 Copy received this 24th day of May, A. D. 1915.
GEO. H. SMITH,
J. V. LYLE,
PAUL WILLIAMS,
Attorneys for Oregon Short Line Railroad Company, Defendant in Error.

W. E. D.

128 UNITED STATES OF AMERICA:

STATE OF UTAH,
County of Salt Lake, ss:

I, H. W. Griffith, Clerk of the Supreme Court of the State of Utah, pursuant to the Writ of Error allowed in the cause wherein The Salt Lake Investment Company, is Plaintiff in Error and the Oregon Short Line Railroad Company is defendant in Error, herewith transmit that portion of the record in said cause as indicated in the præcipe made a part of this record; together with the order of submission of said cause in said Supreme Court of Utah, the judgment rendered and opinion filed therein, the petition for rehearing filed, the order entered denying said petition for rehearing; also the original petition for a writ of error, writ of error, assignments of error, citation, and a copy of the bond filed in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, this the 14th day of July, A. D. 1915.

[Seal State of Utah Supreme Court, Jan. 4, 1896.]

H. W. GRIFFITH,
Clerk Supreme Court.

129 Supreme Court of the United States.

THE SALT LAKE INVESTMENT COMPANY, a Corporation, Plaintiff in Error,
vs.
OREGON SHORT LINE RAILROAD COMPANY, a Corporation, Defendant in Error.

Stipulation.

It is stipulated and agreed by and between the parties hereto that Plaintiff in Error's "Præcipe for Printing Record," served on the 16th day of October, 1915, and hereto attached, may be filed within the next ten days with like effect as had the same been filed on the 16th day of October, 1915.

Dated October 25, 1915.

M. E. WILSON,
E. A. WALTON,
Counsel for Plaintiff in Error.
GEO. H. SMITH,
Counsel for Defendant in Error.

130 Supreme Court of the United States.

THE SALT LAKE INVESTMENT COMPANY, a Corporation, Plaintiff in Error,
vs.
OREGON SHORT LINE RAILROAD COMPANY, a Corporation, Defendant in Error.

Præcipe for Printing Record.

To the Defendant in Error and Geo. H. Smith, its attorney, and to Hon. J. D. Maher, Clerk of said Court:

The plaintiff in error intends to rely on each and all of the errors assigned herein for a reversal of the judgment, and the clerk will print all of the record herein except as herein indicated;

1. The clerk will omit titles of the various papers when unnecessary to be printed.

2. Omit all items in the præcipe for transcript on writ of error, except Item No. 17.

M. E. WILSON,
E. A. WALTON.
Counsel for Plaintiff in Error.

Copy received this 16th day of October, 1915.

GEO. H. SMITH,
Counsel for Defendant in Error.

W. M.

[Endorsed:] 565/24898.

131 Endorsed: File No. 24848. Supreme Court U. S., October term, 1915. Term No. 565. The Salt Lake Investment Co., Pl'ff in Error, vs. Oregon Short Line Railroad Co. Præcipe by plaintiff in error as to printing record and consent to filing same. Filed October 29, 1915.

Endorsed on cover: File No. 24,848. Utah Supreme Court. Term No. 196. The Salt Lake Investment Company, plaintiff in error, vs. Oregon Short Line Railroad Company. Filed July 19th, 1915. File No. 24,848.

No. [redacted] 29

Supreme Court of the United States.

October Term, 1916.

THE SALT LAKE INVESTMENT COMPANY,
Plaintiff in Error,
vs.
OREGON SHORT LINE RAILROAD COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

Brief of Plaintiff in Error.

M. E. WILSON,
E. A. WALTON,
Attorneys for Plaintiff in Error.

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No. 196.

Supreme Court of the United States.

October Term, 1916.

THE SALT LAKE INVESTMENT COMPANY,
Plaintiff in Error,
vs.
OREGON SHORT LINE RAILROAD COMPANY,
Defendent in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

The plaintiff in error commenced this action in the district court for Salt Lake County, Utah, filing its complaint on August 28, 1912, and thereafter filed its amended complaint on December 10, 1912 (Record 1-3), alleging, among other things, that it was the owner and entitled to the possession of a certain described parcel of land situated in lot two of section twenty-three, town-

ship one north of range one west, Salt Lake Meridian, comprising an area of about one acre (small tract with broad black outlines on map opposite Record 4); that on or about the first of April, 1906, the defendant in error wrongfully entered and took possession of the same, without instituting any eminent domain or condemnation proceedings, and without the consent of the plaintiff in error, and thereafter continued to occupy the same for railroad purposes; and that the defendant in error from time to time dumped quantities of earth and similar material on the land, thereby causing the destruction of a hot mineral spring which theretofore arose upon the lands in controversy. The prayer was for money damages for the wrongful appropriation.

Reference to the map opposite Record 4 will disclose that the premises in controversy lie on the westerly side and within two hundred feet of the original main line of the Utah Central Railroad Company as constructed across section twenty-three.

The defendant in error, by its answer, admitted entering upon and taking possession of the land for railroad purposes, at about the time alleged in the complaint, without the consent of the plaintiff in error and without the institution of eminent domain or condemnation proceedings; and alleged that it continuously and exclusively thereafter occupied, possessed and used it for such purposes. It denied plaintiff in error's title and right of possession, and alleged the action barred by statutes of limitation; and further, by way of counter-claim,

pleaded title in itself; and prayed the title quieted in itself. (Record 3-5.)

At the trial, which was before the court and a jury, plaintiff in error introduced evidence in support of its title (Exhibits "A" and "B," Record 37-50), deraigning such title from one Malcom Macduff, who filed his declaratory statement, covering lands embracing those in question, on July 21, 1869, alleging settlement on June 10, 1869 (Record 20), and later purchased the same from the United States on January 19, 1871, procuring patent therefor on June 5, 1871. (Record 22.) The plaintiff in error also introduced testimony tending to show that the country within a radius of a half-mile from the land in question had never been used for municipal purposes. (Record 14.) There was also introduced, on the part of plaintiff in error, evidence of damages sustained by it. (Record 18.)

It was stipulated that the premises at the time of settlement and purchase were within Salt Lake City corporation; that Salt Lake City, pursuant to the Acts of Congress, made an entry, on November 21, 1871, for the citizens of Salt Lake, not embracing the said premises, said entry consisting of 5730.45 acres, all in a compact body and contiguous. (Record 11.)

A motion for non-suit was interposed by the defendant in error, on the grounds that plaintiff in error had failed to show title or damages, and that the action was barred by the statutes of limitation. This motion was by the court denied. (Record 31.)

Thereupon, and in the defendant in error's case, it was stipulated that the court should take judicial notice of the acts of Congress, both public and private, including the act of December 15, 1870, entitled: "An Act granting to the Utah Central Railroad Company the right of way through the public lands for the construction of a railroad and telegraph line." (Record 31.)

The defendant in error then put in evidence conveyances, etc., showing it to be the successor in interest of the Utah Central Railroad Company. (Record 32-4.)

At the close of the evidence the defendant in error moved the court to direct a verdict in its favor on the grounds, among others, "that while the land in question was public land of the United States and subject to disposal by Congress, Congress by its act conveyed a right of way four hundred feet in width, of which this is a portion, to the Utah Central Railroad Company, which, as appears by the evidence, is predecessor in interest of the Oregon Short Line Railroad Company"; and secondly, "the land was not subject to pre-emption or homestead entry by Malcolm Macduff, and title has never passed out of the United States as yet, except for the right of way in question." (Record 35.)

The motion was denied. (Record 37.) And plaintiff in error had a verdict of $4000, on which judgment was duly entered. (Record 7.)

On appeal to the Supreme Court of the State of Utah, that court held that defendant's motion for nonsuit was properly denied; and held generally, on matters of law involved in the case, with the plaintiff in error;

except it held that defendant in error had shown paramount title through the act of Congress of December 15, 1870, granting right of way through the public lands to the Utah Central Railroad Company; but it based its conclusion solely upon the ground that it had previously held that such grant included lands within the limits of Salt Lake City. (Record 61.)

The Supreme Court of the State of Utah thereupon reversed the judgment of the district court, and remanded the cause, with directions to enter a judgment in favor of the defendant in error, quieting its title as prayed. (Record 62.)

Thereupon the cause was brought to this court by writ of error.

SPECIFICATIONS OF ERROR.

I.

The Supreme Court of the State of Utah erred in reversing the judgment of the District Court.

II.

The Supreme Court of the State of Utah erred in its decision in this cause in not giving effect to the Act of Congress of March 3rd, 1877, entitled, "An Act respecting the limits of reservations for townsite upon the public domain" (19 Stat. at Large, 392).

III.

The Supreme Court of the State of Utah erred in its decision in this cause in not giving effect to the preemption entry of Malcolm Macduff, the predecessor in

title of the plaintiff, and in not giving effect to, and in denying the validity of, the patent to the premises in question, issued by the United States Government to Malcolm Macduff.

IV.

The Supreme Court of the State of Utah erred in its decision in this cause in not giving effect to Sections 2387, 2388, 2389 and 2390 of the Revised Statutes of the United States.

V.

The Supreme Court of the State of Utah erred in its decision in this cause in ascribing to the case of Moon v. Salt Lake County (27 Utah 435) the force of paramount authority.

VI.

The Supreme Court of the State of Utah erred in its decision in holding that the premises in question were "public lands" within the purview of the Act of Congress granting a right of way to the Utah Central Railroad Company.

VII.

The Supreme Court of the State of Utah erred in not affirming the judgment of the District Court. (Record 68.)

BRIEF OF THE ARGUMENT.

I.

The lands in question were not public lands at the date (December 15, 1870) of the grant to the Utah Central Railroad Company.

(a) Macduff, the predecessor of plaintiff in error, was prior in time.

(b) The lands in question were subject to a floating grant to Salt Lake City, in trust for its inhabitants, including Macduff.

(c) The term "public lands" in a right of way grant excludes lands not subject to sale under the general land laws.

We will discuss the above proposition in the order stated.

(a)

Malcolm Macduff filed, in the land office at Salt Lake City, a pre-emption declaratory statement embracing the lands in question on July 21, 1869. He received final receipt March, 1871. (Record 38-9.) And a United States patent June 6, 1871. ((Record 39.)

His settlement and possession was apparently recognized by the predecessor of defendant in error, because it took from him a conveyance of a hundred foot strip June 7, 1870. (Record 40.)

Now, whether or not the patent was rightfully issued to Macduff, the fact remains that he had an existing claim, shown on the records of the local land office, which was recognized by the government officers, and this alone,

we contend, is sufficient to remove this land from the category of public lands.

In the case of Whitney v. Taylor, 158 U. S. 85, this court held that a claim so recognized by the government, though not enforceable by the claimant, excepted the land from a railroad land grant containing the ordinary excepting clauses. The court said:

> "When on the records of the local land office there is an existing claim on the part of an individual under the homestead or pre-emption law which has been recognized by the officers of the government and has not been cancelled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforcible by the claimant and is subject to cancellation by the government at its own suggestion or on the application of other parties."

In the case of Nelson v. Northern Pacific R. R. Co., 188 U. S. 108, it was held that a mere settlement of a person upon lands of the United States with an intention to perfect title as soon as the lands should be surveyed, withdrew such land from the operation of the grant to a railroad.

A settler residing on land at the time of the filing of the railroad's map of location has a superior right.

> Northern Pacific Ry. v. McCormick, 94 Fed. 939.

In the case of Minnesota v. Hitchcock, 185 U. S. 373, the State of Minnesota claimed under a grant to it by

Congress of sections 16 and 36 in every township of the public lands in such state. Certain lands including such designated sections were held in fee by the United States but there was an Indian right of occupancy. The court held that such right of occupancy in the Indians kept the land so occupied from the category of public lands, following with approval the case of Newhall v. Sanger, 92 U. S. 761.

In Newhall v. Sanger, 92 U. S. 761, the court held that the lands within the boundaries of an alleged Mexican or Spanish grant which was then *sub judice* were not public lands within the meaning of Congress granting public lands, though there was no exception made in the grant. The court said:

> "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

In the case last cited, it was held immaterial whether the Mexican grant was valid or invalid where the question of the validity was under investigation by the proper tribunal when the map of definite location was filed.

(b)

Sections 2387 and 2388, Revised Statutes of the United States, are as follows:

> "SEC. 2387. Whenever any portion of the public lands have been or may be settled upon and occupied as a town-site, not subject to entry under the agricultural pre-emption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court

for the county in which such town is situated, to enter at the proper land-office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated.

"SEC. 2388. The entry of the land provided for in the preceding section shall be made, or a declaratory statement of the purpose of the inhabitants to enter it as a town-site shall be filed with the register of the proper land-office, prior to the commencement of the public sale of the body of land in which it is included, and the entry or declaratory statement shall include only such land as is actually occupied by the town, and the title to which is in the United States; but in any Territory in which a land office may not have been established, such declaratory statements may be filed with the surveyor-general of the surveying-district in which the lands are situated; who shall transmit the same to the General Land Office."

The next two sections limit the right of entry, in the case of Salt Lake City, to 1280 acres, and an additional 320 acres for each one thousand inhabitants, not exceeding fifteen thousand in all.

Under this grant to Salt Lake City, Macduff, or any occupant of land that might be selected thereunder, had an equitable interest therein.

Stringfellow v. Cain, 99 U. S. 610;
Hussy v. Smith, 99 U. S. 20.

This grant to Salt Lake City for the benefit of its inhabitants was, in substance, a grant of a certain quantity within out-boundaries containing a greater area, and the right of selection of the smaller quantity was vested, not in the government, but in Salt Lake City, the grantee. While this right of pre-emption existed in the city, the government had no right to grant to the railroad company any lands that might be so selected. But it made no attempt to grant this particular land by a description covering the same, and it limited its grant to "public lands."

In Doolan v. Carr, 125 U. S. 618, 632, it was said:

> "To the extent of the claim when the grant was for land within specific boundaries, or known by a particular name, and to the extent of the quantity claimed within outboundaries containing a greater area, they are excluded from the grant to the railroad.
>
> "Indeed, this exclusion did not depend upon the validity of the claim asserted, or its final establishment, but upon the fact that there existed a claim of a right under a grant by the Mexican government, which was yet undetermined and to which therefore the phrase 'public lands' could not attach, and which the statute did not include, although it might be found within the limits prescribed on each side of the road when located."

See also:

United States v. Or. & C. R. Co., 69 Fed. 899, 902;

United States v. McLaughlin, 127 U. S. 449.

The fact that the premises in question were not included finally within the lands selected by Salt Lake City does not aid the defendant in error.

In the case of Kansas Pacific R. Co. v. Dunmeyer, 113 U. S. 629, one Miller had made a homestead entry on the land in controversy prior to the filing of the map of definite location. Thereafter he abandoned his homestead claim and the contention was that such abandonment inured to the benefit of the railroad company and subjected the land to the operation of the grant; but this contention was denied, the court holding that the condition of the title at the date of the definite location determined the question as to whether the land passed to the railroad company or not.

(c)

Defendant in error will contend that the Macduff entry and patent were void under the provisions of Revised Statutes Section 2258. This contention was made in the court below. The section is as follows:

"SEC. 2258. The following classes of lands, unless otherwise specially provided for by law, shall not be subject to the rights of pre-emption, to-wit:

First. Lands included in any reservation by any treaty, law, or proclamation of the President, for any purpose.

Second. Lands included within the limits of any incorporated town, or selected as the site of a city or town.

Third. Lands actually settled and occupied for purposes of trade and business, and not for agriculture.

Fourth. Lands on which are situated any known salines or mines."

We may concede that the land in question, by reason of being within the limits of Salt Lake City, was not subject to the general right of pre-emption, but was only subject as "specially provided for by law" to the right of pre-emption of Salt Lake City.

But if, as counsel will contend, this section inhibited the purchase of such lands under the general land laws, such as was made by Macduff, then this very section takes the land out of the category of "public lands," so that the same was not included within the terms of the grant to the Utah Central Railroad Company.

We have here then, as above shown, three separate things making against the contention that the lands in question were "public lands" at the time of the grant to the Utah Central Railroad Company: First—The lawful settlement and possession of Macduff, an inhabitant of Salt Lake City; Second—The pre-emption right of Salt Lake City with respect to such lands; Third—The prohibition of the sale of such land under the general land laws.

In the case of Northern Pacific R. R. Co. v. Harris, 215 U. S. 386, this court took occasion to define the term "public lands" as used in a right of way railroad grant, and said:

"The grant of the right of way was 'through the public lands.' What is meant by 'public lands' is well settled.

> "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

And the court expressly disapproved U. P. R. R. Co. v. Douglas County, 31 Fed. 540, a case much relied upon by defendant in error.

In Washington & I. R. Co. v. Osborne, 160 U. S. 103, Osborne was a settler upon unsurveyed public land and had placed improvements thereon intending, when the surveys were made, to pre-empt the same under the general land laws. The railroad company received a grant of a right of way through the public lands of the United States, subject to certain exceptions within the terms of which Osborne did not come. This court sustained Osborne's claim of priority, saying that "it would not be easy to suppose that Congress would, in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their roads at pleasure regardless of the rights of settlers."

By "public land" is meant such land as is open to sale or other disposal under general laws.

Barden v. Northern Pacific R. R. Co., 145 U. S. 535;

Mann v. Tacoma Land Co., 153 U. S. 273;

Minnesota v. Hitchcock, 185 U. S. 392;

Mo., K. & T. R. Co. v. United States, 235 U. S. 37;

Northern Pacific R. Co. v. Musser-Sauntry etc Co., 168 U. S. 604;

Northern Lumber Co. v. O'Brien, 204 U. S. 190;

Kindred v. U. P. R. Co., 225 U. S. 582.

Under the doctrine of the case last cited, in order to sustain the contention of the defendant in error, the grant to the Utah Central Railroad Company should have contained a clause to the effect that the United States should extinguish the Macduff title and the Salt Lake City title. If such a provision had been in the act, it is conceivable that there would be some reason to urge that the term "public lands" was used with other than its ordinary meaning.

It will be urged by defendant in error that mere occupation and improvement with a view to pre-emption do not confer a vested right in the settler so as to deprive Congress of the power of disposition of the land. We do not contend to the contrary. The question here is not what Congress could have done, but what it did do; and there is nothing in the language of the grant in question, or in any surrounding circumstance, tending to show that the term "public lands" was used in any other than its ordinary sense.

II.

The Macduff entry, under which plaintiff claims, was not invalid.

It was strenuously urged in the court below that the Macduff entry in 1869 was invalid because within the limits of Salt Lake City; in other words, because such lands did not come within the category of lands subject to sale under the general land laws; and with great confidence defendant in error cited Burfenning v. Chicago, St. Paul etc. Ry., 163 U. S. 321.

We do not regard the case as at all in point. The State Supreme Court discussed the proposition in its opinion, and, while seeming to agree with our contetntion that the case was not in point and that the Act of Congress of March 3rd, 1877 (19 Stat. at Large 392), validated the entry, that court held that the decisive question was whether the right of way grant to the railroad company embraced this land.

It is true that the original opinion stated that the motion for a non-suit should have been granted, but, on petition for re-hearing, the court's attention being called to this point, the opinion was modified by striking out such holding. (Record 63.)

So it is manifest that the State Supreme Court held with the plaintiff in error in all respects, except upon the proposition contended for by the defendant in error, namely, that the premises in question were included within its right of way grant.

In the Burfenning case the Supreme Court of the United States held that a homestead patent for lands within the limits of an incorporated city was void. The court did not consider the Act of March 3d, 1877, and naturally the court would not consider such Act, for the reason that the case did not fall within it.

The reason the court did not consider the provisions of such curative and relief act was that such act related only to incorporated *towns or cities upon the public lands of the United States,* and the city of Minneapolis was not in fact or claimed to be an incorporated town upon the public lands of the United States.

As was pointed out distinctly in the case of Houlton v. C., St. P., M. & O. R. R. Co., 86 Wis. 59, 56 N. W. 336, that act related only to such cities as Salt Lake, and others, which were incorporated entirely and wholly upon the public lands, and unlike such cities as Superior City, Minneapolis, and Omaha.

The curative act of March 3d, 1877, referred to by plaintiff in error, was clearly intended for the relief of persons in the situation of Macduff and is entitled to be liberally construed to effectuate its general intent.

The language is that the entries "are hereby confirmed." The argument of defendant in error in the court below implied that entries that had not gone to patent would be confirmed and entries that had gone to patent would not be confirmed. But this is an intolerable construction. It is in effect a suggestion that the patent be surrendered and then a new patent issue.

On the construction of this act we call attention to:

Alger v. Hill, 2. Wash. St. 344, 27 Pac. 922;
Vilas v. Alger, 109 Fed. 519.

A similarly technical contention was made in the case of Or. & C. R. R. Co. v. United States, 190 U. S. 186, where the court said:

> "It would be useless to direct the cancellation of the patent as it would become the duty of the land department to issue immediately a new one for the same property."

The doctrine of relation applies so as to make the Macduff title good from the date of the filing of the

declaratory statement or his settlement cited therein in 1869.

Brigham City v. Rich, 34 Utah 130;
Weyerheuser v. Hoyt, 219 U. S. 380.

It is respectfully submitted that the judgment of the Supreme Court of the State of Utah should be reversed.

M. E. WILSON,
E. A. WALTON,
Attorneys for Plaintiff in Error.

No. 195.

Supreme Court of the United States

October Term, 1916.

THE SALT LAKE INVESTMENT COMPANY,
Plaintiff in Error,
vs.
OREGON SHORT LINE RAILROAD COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

Reply Brief of Plaintiff in Error.

M. E. WILSON,
E. A. WALTON,
Counsel for Plaintiff in Error.

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No. 196.

Supreme Court of the United States

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IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

Reply Brief of Plaintiff in Error.

I.

THIS COURT HAS JURISDICTION.

It is said by defendant in error that the mere fact at the parties deraign their titles from the United ates is not sufficient to sustain jurisdiction. That may conceded. That is the extent of the doctrine announced the case of DeLamar's Nevada G. M. Co. v. Nesbitt,

177 U. S. 523, and the other case cited to the point, at page 6 of defendant in error's brief.

It needs no argument to show that those authorities have no application here. Both the construction and applicability of federal statutes and grants are the subject of dispute between the parties; and the judgment of the state court rests upon a denial of the efficacy of the federal grant which is the basis of plaintiff in error's title.

Defendant in error says (Brief 7): "The answer set up two defenses of confession and avoidance; first, the local statute of limitations; and second, title of the railroad company to the parcel in suit under Act of Congress of December 15, 1870, granting a right of way to the Utah Central Railroad Company."

The defense of limitations, it is true, proceeds by way of confession and avoidance. The other defense, we submit, does not. On the contrary, it goes in denial of plaintiff in error's title. True, it may confess the existence of the evidences of plaintiff in error's title, but it denies the legal effect, the legal inferences, springing from such evidences. This, we submit, is not confession and avoidance under any known system of pleading.

True, the state supreme court gave a *prima facie* effect to plaintiff in error's evidences of title. And, in finally holding that the motion for nonsuit was properly overruled, it held that the patent to Macduff and confirmatory statute tended to show title, and made a *prima facie* case for plaintiff in error.

Had the court held that plaintiff in error conclusively established title and then that the defendant in error should prevail upon the defense of limitations, we would not claim that there had been a denial of a federal right.

But the defendant in error prevailed upon its defense of older and conflicting federal grant, the holding of which to be valid and older necessarily denied the existence of the right claimed by plaintiff in error under the grant to its predecessor in title.

Under some circumstances, and in some relations, for instance, were it a case depending upon the application of the doctrine of relation, it would appear that the title of plaintiff in error was the older title, the patent relating back to the Macduff settlement. But, independently of considerations of the effect of the grant to Salt Lake City, and with respect only to the *power* of Congress, it may be (as is contended) that the title of plaintiff in error beginning with the patent to Macduff is junior to the alleged title of defendant in error.

It is said that the railroad company rather than the plaintiff claimed a federal right and that the claimed right was not denied. (Brief 9.) But the fact is ignored by defendant in error that it so happens in this case that the sustaining of defendant's claim under one Act, is the denial—not an avoidance—of the right claimed by plaintiff in error under other federal grants and statutes.

Even a sustaining of the defense of limitations would not always be a matter of confession and avoidance, and a matter depending upon local law so as to defeat juris-

diction; but did a defense of limitations involve a denial of a plaintiff's right of recovery, as for instance, where the statute of limitations was held to run while the title was in the government, this court would have appellate jurisdiction.

Gibson v. Chouteau, 13 Wall. 92.

See also:

Railway Co. v. Price, 133 U. S. 511;
Van Brocklyn v. Tennessee, 117 U. S. 167.

Counsel say that this case falls squarely within the principle of Missouri v. Andriano, 138 U. S. 496, and Kizer v. Texarkana etc. Ry. Co., 179 U. S. 199.

Reference to those cases discloses that plaintiffs in error there were not claiming federal rights. They were merely claiming a different construction of the Acts of Congress from that held by the state court, the defendants in error there claiming federal rights thereunder.

According to defendant in error's theory here, where both parties claim under distinct Acts of Congress, this court could never have jurisdiction where the prevailing party in a state court had had his contention sustained in respect of the statute under which he claimed. This, we submit, is not and never has been, the law.

If the case here were one where we were not claiming a federal right, for example, if we were sued for trespass by the railroad company and claimed no title ourselves, then we concede that were we cast in the state court we could not invoke the jurisdiction of this court; while if the result were the other way the railroad could come here.

But if in such an action we set up a title paramount originating in United States patents and Acts of Congress, and such federal rights were held invalid for any cause, even by reason of a holding of a particular construction of the right of way act, we submit that the result would be a denial by the state court of the federal right set up by us.

In Cunningham v. Ashley, 14 How. 377, plaintiff, who was plaintiff in error, claimed a pre-emption title under the Act of 1830. The defendant claimed under patents. The Supreme Court of Arkansas sustained the patent title. This court, holding the patents void, said as to jurisdiction: "As the right set up by the complainant arises under an Act of Congress and the decision of the Supreme Court of Arkansas was against that right, this court has jurisdiction of the case." (Opinion 389.)

A decision of a state court against a claim of title under a purchase from the United States on the ground that an older patent had been issued by the United States in favor of another party, was held reviewable by this court in the case of Bell v. Hearne, 19 How. 252.

In the case of Johnson v. Towsley, 13 Wall. 72, where, as here, the plaintiff relied upon a patent and certain Acts of Congress confirmatory, and the state court held the title bad, this court sustained his right to a writ of error.

In the case of Moore v. Robins, 6 Otto 530, this court said: "But, as both parties assert a right to the land under purchase from the United States, and since their rights depend upon the laws of the United States con-

cerning the sale of its public lands, there is a question of which this court must take cognizance." See also:

Hussman v. Durham, 165 U. S. 144;
Peck v. Jenness, 7 Hok. 612;
Reichart v. Felps, 6 Wall. 160.

II.

CONSTRUCTION OF THE RIGHT OF WAY GRANT.

Counsel contend for a very liberal construction. They refer to Kindred v. Union Pacific Railroad Company, 225 U. S. 582, and claim that this case militates against our contention as to the connotation of the term "public lands" in a right of way grant. In the case cited the court held that the term was "used in a larger and different sense" than its usual and ordinary meaning, for the reason that the grant explicitly dealt with the manner of extinguishing the Indian titles, and that the treaty provision with the Delawares should be considered in connection with the grant, and that considering all such matters together it was intended that the railroad company should have the title, compensation being paid to the Indians therefor.

It is claimed that the particular language of the Act with reference to the filing of a map "exhibiting the line of the railroad of said company as the same has been located and constructed" not only should be taken as proof that the railroad had already been constructed, but also that such fact tends to enlarge the meaning of the term "public lands."

We say that neither the recital in the Act nor the opinion of the Utah Supreme Court in Moon v. Salt Lake County, 27 Utah 435, establishes the fact, and we further submit that if such were the fact it would not have the influence ascribed to it.

The purpose of filing a map of definite location, we submit, is rather for the purpose of identification than the giving of unusual functions to the terms descriptive of the thing granted.

Counsel seek to distinguish Washington & Idaho R. R. Co. v. Osborne, 160 U. S. 103, because it is said in that case that the railroad company had the right of eminent domain, and it is suggested here that no such right existed at the time of the Utah Central grant of December 15, 1870. But the Territorial Act of February 12, 1869, gave to railroad companies in Utah the right of eminent domain, and it would be going a long way to say that this statute was invalid. (Compiled Laws of Utah, 1876, pp. 202, 211.)

III.

THE ENTRY AND PATENT OF MACDUFF WAS AT THE MOST VOIDABLE AND NOT VOID.

In the case of United States ex. rel. McBride v. Schurz, 102 U. S. 407, this court granted a mandamus against the Secretary of the Interior to deliver a patent contended to be void because the land described therein was within the incorporated town of Grantsville, Utah. The court said: "Here the question is whether this land had been withdrawn

from the control of the land department by certain acts of other persons which include it within the limits of an incorporated town. The latter question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously the patent may be voidable but not absolutely void." (Opinion 401.)

This being true the confirmatory act of 1877 cured any defect in the Macduff title.

Whence it follows that unless the United States was the equitable and legal owner of these premises on December 15, 1870, and unless the right of way Act of that date shows that Congress intended to grant these premises to the Utah Central Railroad Company, the plaintiff in error exhibited in this record conclusive evidence of title under the laws of the United States.

IV.

THE TOWNSITE ACTS RESERVED TO SALT LAKE CITY AND ITS INHABITANTS THE RIGHT TO SELECT THE LAND IN CONTROVERSY.

It is true we deraign no title through Salt Lake City, but if the city had the right to select this land under sections 2387-2390 R. S. U. S., such right is inconsistent with the notion that Congress had the power or the intention to grant such land to the Utah Central.

Northern Pacific Railroad Company v. Smith, 171 U. S. 260, is cited by defendant in error. That case fell within section 2382 R. S. U. S., and we submit is not in

point. Under that section there was no grant *in praesenti* and no plat was filed by the townsite company until after the land grant railway company constructed its line across the tract.

In the case of Scully v. Squier, 215 U. S. 144, the court cited with approval Stringfellow v. Cain, 99 U. S. 610; and Hussey v. Smith, 99 U. S. 20; and many state cases to the same effect; and said: "Section 2387 constitutes the grant of title." And the court proceeded to hold that the equitable grantees under said section were the occupants of the land.

Whether the lands in controversy were public lands on the date of the right of way grant depended upon the facts and the law existing at that time, and not upon any subsequent act of the city authorities in selecting and entering the quantity permitted by the statute. And as long as the grantees under section 2387 had the right of selection we submit it was not within the power of Congress to grant this land to the railroad company. To say otherwise is to say that Congress could have granted every acre within Salt Lake City to the railroad company if it had chosen to do so, notwithstanding the prior statute referred to.

We do not understand that Carr v. Quigley, 149 U. S. 652, in any wise overruled the case of Doolan v. Carr, 125 U. S. 618; or that Newhall v. Sanger, 92 U. S. 761, was overruled by U. S. v. McLaughlin, 127 U. S. 428.

The McLaughlin case held that as a matter of fact the Mexican floating grant left the option in the government to make the selection, and not in the grantee. There

was no disagreement expressed with the law as to floating grants which had been held in Newhall v. Sanger; and the same may be said of Carr v. Quigley, 149 U. S. 652.

In the present case, it is submitted, the government did not attempt by its legislation to reserve any right of selection of any particular tracts other than to say that the exterior limits of the quantity granted should conform to legal subdivisions.

It is again respectfully submitted not only that the jurisdiction is clear, but that on the merits the judgment of the Supreme Court of Utah should be reversed.

M. E. WILSON,
E. A. WALTON,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1916

No. 29

SALT LAKE INVESTMENT COMPANY,
Plaintiff-in-Error,

vs.

OREGON SHORT LINE RAILROAD COMPANY,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

HENRY W. CLARK,
GEORGE H. SMITH,
H. B. THOMPSON,
Of Counsel.

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CASES CITED.

STATUTES CITED.

Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 196.

SALT LAKE INVESTMENT COMPANY,
Plaintiff-in-Error,

vs.

OREGON SHORT LINE RAILROAD COMPANY,
Defendant-in-Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

BRIEF OF DEFENDANT IN ERROR.

Statement.

This suit was instuted by the Salt Lake Investment Company, plaintiff-in-error, in the Third Judicial District Court of the State of Utah. The plaintiff asserted ownership of a parcel of land containing about one acre located in the outskirts of the City of Salt Lake, and

prayed damages for the alleged unlawful appropriation of the property by the Oregon Short Line Railroad Company, defendant-in-error, for its railroad purposes. The Railroad Company admitted that it had for a number of years been in the exclusive occupation of the premises and operating its railroad thereover, denied the allegations of the plaintiff's ownership, pleaded local statutes of limitation, pleaded also title in itself by virtue of the Act of Congress of December 15, 1870 [16 Stats. 395], granting a right of way to the Utah Central Railroad Company, and prayed for judgment quieting the title in its favor. [Pleadings, pp. 1 to 5].

The trial court ruled the question of title in favor o the plaintiff and left to the jury only the question of damages. The jury's verdict was for $4,000 as the value of the land, although the plaintiff's abstract of title discloses that previous conveyances of the parcel were made in consideration of practically nominal amounts [pp. 44 and 48], and although the chief element of value claimed for the land was a hot mineral spring known as the "Hobo Spring" because of its popularity with "hoboes" as a bathing resort [p. 15]. Upon this verdict judgment was entered that the plaintiff recover $4,000 with interest and costs [p. 7].

The Railroad Company presented in its appeal to the State Supreme Court various questions as to the admissibility of testimony concerning value and as to the local statutes of limitation, all of which were decided against it by that Court [pp. 54 to 58]. But the State Supreme Court held in favor of the Railroad Company

under the Utah Central right of way Act, and thereupon reversed the judgment and remanded the case with direction to enter a judgment quieting title in the Railroad Company [p. 62]. Decision of State Supreme Court is reported in 148 Pacific Reporter, 439.

The Salt Lake Investment Company traces its claim of title, through various mesne conveyances, to an entry made by one Malcolm Macduff on July 21, 1869, purporting to be made under the pre-emption law [Record, pp. 10, 38 to 50]. The Oregon Short Line Railroad Company is conceded to be the successor in title and interest of the Utah Central Railroad Company to which the right of way grant was made by the aforesaid Act of Congress of December 15, 1870 [pp. 53, 54].

The facts and statutes material to the question of title, stated according to their sequence in point of time, are as follows: The pre-emption law of September 4, 1841 [5 Stats. 455], prohibited entry thereunder upon lands within the limits of any incorporated town. Salt Lake City was incorporated in 1860 by Act of the Territorial Legisiatute of Utah, and the corporate limits fixed thereby included the premises in controversy [p. 15]. On July 21, 1869, declaratory statement, purporting to be under the pre-emption law of 1841, was filed in the local land office by Malcolm Macduff covering 167 acres in Section 23, township 1 north, range 1 west, Salt Lake base and meridian, including the one acre in suit [pp. 38, 50]. December 15, 1870, [16 Stats. 395] Congress granted to the

Utah Central Railroad Company a right of way for its railroad through the public lands, 200 feet wide on each side of the center line of the road, from a point at or near Ogden City, Utah, to Salt Lake City and required the filing within three months from the passage of the Act of a map "exhibiting the line of the railroad of said company *as the same has been located and constructed*". (See text of Act in Appendix hereto). The answer alleges that the road had been constructed and completed by January 1, 1870, nearly a year prior to the right of way Act [p. 4]. Evidence of that fact is not included in this transcript; but it is not disputed that the road was already constructed at the time the right of way Act was enacted, as recognized by the terms of that Act, and the exact date of construction is not important. The Utah Central Railroad Company accepted the terms of the grant and map of the constructed road was filed within the time prescribed by the Act and approved [pp. 51, 52 and 53]. Macduff had not at the date of the right of way Act made payment or secured his final receipt, but did so early in 1871 and patent issued to him June 6, 1871 [pp. 38, 39]. Townsite entry was made by the Mayor of Salt Lake City November 21, 1871, selecting 5730.45 acres, but not including the premises in question or *any part of* Section 23 [pp. 11, 26]. Act of Congress of March 3, 1877 [19 Stats. 392], among other things, validated under certain restrictions preemption and homestead entries theretofore made within

the limits of an incorporated town upon the public lands.

The one acre parcel in suit was within 200 feet of the center line of the railroad of the Utah Central Railroad Company as originally constructed. [Conceded, p. 2, brief of plaintiff-in-error].

Passing reference is made in the brief for the plaintiff-in-error to the fact that the record shows a conveyance of a 100 foot right of way by Macduff to Utah Central Railroad Company. It should be noted, however, that this purchase of right of way was made on June 7, 1870, several months prior to the congressional grant of right of way [p. 40].

POINT I.

This court is without jurisdiction.

If jurisdiction exists in this Court to review the decision of the Utah Supreme Court the source of such jurisdiction must be found in that clause of Section 237 of the Judicial Code which authorizes a review by this Court of the final judgment of the State court,— " where any title, right, privilege, or immunity is claimed " under the Constitution, or any treaty or statute of, or " commission held or authority exercised under, the " United States, and the decision is *against* the title, " right, privilege, or immunity especially set up or

" claimed, by either party, under such Constitution, " treaty, statute, commission, or authority ".

It is true that both parties invoked Federal statutes as the origin of their respective titles. The plaintiff claimed through a patent of the United States; the Railroad Company under an Act of Congress granting a right of way. But the mere assertion of title under a patent from the United States, or a title otherwise having origin in the laws of the United States, is not sufficient of itself even to confer jurisdiction on a Federal court as a court of first instance. *Bonin* v. *Gulf Co.*, 198 U. S. 115. *Shulthis* v. *McDougal*, 225 U. S. 561. And in testing the jurisdiction of this Court to review by writ of error the final judgment of the State court it is not sufficient to sustain such jurisdiction that the plaintiff-in-error, or even both parties, claim title through a patent of the United States or otherwise under Federal laws. *De Lamar's Nevada G. M. Co.* v. *Nesbitt*, 177 U. S. 523, 527. *California Powder Works* v. *Davis*, 151 U. S. 389. It was said in *De Lamar's Nevada G. M. Co.* v. *Nesbitt*, 177 U. S. 523 at p. 527: " To raise a Federal ques- " tion the right must be one claimed under a particular " statute of the United States, the validity, construc- " tion or applicability of which was made the subject of " dispute in the State court; and the decision upon " such statute must have been adverse to the plaintiff- " in-error ".

The complaint in the present suit suggested no Federal question; it merely alleged ownership in the

plaintiff in the most general terms, without stating the source of title. The answer set up two defenses of confession and avoidance, first, the local statute of limitations, and, second, title of the Railroad Company to the parcel in suit under Act of Congress of December 15, 1870, granting a right of way to the Utah Central Railroad Co.

The answer also contained denials of the material allegations of the complaint, but by reference to the proceedings at the trial it appears that the controversy and the decision of the court related solely to the proper construction of the Utah Central right of way Act. The plaintiff's case, eliminating evidence on subjects not now material, consisted of proof of pre-emption entry made by one Macduff in 1869, issue of patent thereon in 1871, the mesne conveyances from Macduff to the plaintiff, and facts as to the non-occupation of the land necessary to bring the Macduff entry within the restrictions and terms of the Act of Congress of March 3, 1877, which validated pre-emption entries previously made within the limits of incorporated cities [pp. 8–15; 18–30]. The defendant's case consisted of the introduction of the Utah Central right of way Act of 1870 and proof of the defendant's succession to the title and interest of the Utah Central Railroad Company therein [pp. 31–35]. At the conclusion of the testimony counsel for both parties agreed that there was no question for the jury as to the title [pp. 36 and 37] and both parties moved for the direction of a verdict [pp. 34, 35 and 36]. The motion of the defendant

was overruled [p. 37] and only the question of t
amount of damages left to the jury [p. 6].

The Supreme Court reversed the judgment in fav
of the plaintiff, but, as appears by its opinion, sole
upon the ground that the Utah Central right of w
Act should be construed as attaching, notwithstandi
the plaintiff's contention that the grant did not app
to land within the limits of an incorporated city [p
60–62]. This is confirmed by the deliberate amen
ment made, upon rehearing by the Supreme Cou
of its original opinion. The opinion as original
handed down concluded with a holding that the d
fendant's "motions for a non-suit and for a direct
"verdict in its favor ought to have been granted". C
the application of the plaintiff, this was modified
read merely that the "motion for a directed verd
"ought to have been granted" [p. 63]. In oth
words, the State court recognized in all respects t
sufficiency of the plaintiff's title as made out by
own case.

There has been no controversy in this case as
the meaning or application of the pre-emption law
of the confirmatory Act of Congress of 1877. It h
not been disputed by the plaintiff-in-error that und
the pre-emption law the attempted entry by Macd
and the patent based thereon were void, unless a
until validated by the Act of 1877; nor has it been d
puted that the entry and patent could not be validat
by the Act of 1877 as against the Utah Central gra

of right of way in 1870 if the granting Act could be construed as applicable to this land.

Therefore conceding that the plaintiff's case involved a claim of a right under Federal statutes and that this right has been denied, in the sense that the plaintiff has not recovered the judgment sought, the denial of this right, or, more properly speaking, the plaintiffs defeat, resulted from the establishment by way of confession and avoidance of a paramount title. The plea of the statute of limitations and the plea of the Utah Central grant stood upon exactly the same footing as regards this question of appellate jurisdiction. The plaintiff-in-error is in precisely the same position upon the jurisdictional question as if the Utah Supreme Court had sustained the plea of the statute of limitations instead of the plea of the right of way grant. It is perfectly clear that if the decision had turned upon the statute of limitations, this Court would not have jurisdiction. *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468, 470, *Wood* v. *Chesborough*, 228 U. S. 672, 677, *Moran* v. *Horsky*, 178 U. S. 205, 214.

The question decided by the Utah Supreme Court was a Federal question, but it was the Railroad Company, rather than the plaintiff, which claimed a right under the Utah Central right of way Act, and the right so claimed was not denied by the State court, as must be the case to give this Court jurisdiction under Section 237 of the Judicial Code, but was sustained. The case therefore falls squarely within the principle of

such precedents as *Missouri* v. *Andriano*, 138 U. S. 496, and *Kizer* v. *Texarkana, etc., Ry. Co.*, 179 U. S. 199. The latter case was an action for damages for breach of contract, the plaintiff alleging that the railway company had agreed to a special rate for carrying lumber between certain points. The defendant set up the Interstate Commerce Act and alleged that the contract was void under this Act. In dismissing the writ of error for want of jurisdiction Mr. Justice Peckham said [p. 201]:

"That a Federal statute was construed unfavorably "to one of the parties to the suit is no ground for "jurisdiction by this court, unless such construction "was not only unfavorable, but was against the right, "etc., specially set up and claimed under the statute. "* * * Thus it might happen, as it has happened "in this case, that, while the decision upon the con- "struction of the statute was unfavorable to the main- "tenance of the cause of action set forth by the plain- "tiff in error, it was not against, but in favor of, the "claim made under the Federal statute. The question "whether that statute, properly construed, prohibited "the making of such an agreement as that set up in "the complaint in the state court, having been decided "in favor of the claim set up by defendant under the "statute, this court has no jurisdiction to review the "judgment."

The purpose underlying Section 237 of the Judicial Code was to prevent the State courts from impairing

and frittering away the authority of the Federal government by failing to give force to the Federal statutes. In this case the right of way grant (which constitutes the entire controversy,) was a special grant and affected only land within the State of Utah. The court of last resort of that State has not only in the present case but also in *Moon* v. *Salt Lake County*, 27 Utah 435, construed this right of way grant as applying to land within the limits of Salt Lake City. There is, therefore, no occasion for the exercise of jurisdiction by this Court in aid of this Federal Statute.

There are some cases in which this Court has upheld its jurisdiction which would seem superficially to lend color to the theory that jurisdiction exists wherever a party has contended for a particular construction of a Federal Statute, and his contention has been denied. We refer to cases involving the Safety Appliance, Employers' Liability and Hours of Service Acts. For example: *St. Louis & Iron Mountain R. R. Co.* v. *Taylor*, 210 U. S. 281. *St. Louis & Iron Mountain R. R. Co.* v. *McWhirter*, 229 U. S. 265. But a careful analysis of the cases of which the foregoing are examples shows there is no conflict between them and the authorities upon which we rely, and that they do not countenance any such liberal rule or test of jurisdiction as that superficially suggested. The Safety Appliance, Hours of Service and Employers' Liability Act cases inherently and exclusively involve the operation and effect of those Federal Statutes, and the rights of both parties in each case thereunder necessarily

depend upon the construction of the same Federal Statute. And, finally, in those cases without a reasonably liberal exercise of jurisdiction by this Court, no uniformity in the construction of those laws and in their operation in the various States could be secured, as stated in the opinion in the *Taylor* case, *supra*,—a consideration which does not apply in the case of a special statute, which, like the Utah Central grant, operates in only one State.

POINT II.

The railroad right of way grant attached to the parcel in suit notwithstanding the prior attempted pre-emption entry and notwithstanding the fact that the parcel was within incorporated city limits.

Act of Congress of December 15, 1870 [16 Stats. 395; printed in appendix hereto], as far as material to this controversy, provided as follows: "That the right "of way through the public lands be, and the same is "hereby, granted to the Utah Central Railroad Com- "pany, a corporation created under the laws of the "legislative assembly of the Territory of Utah, its suc- "cessors and assigns, for the construction of a railroad "and telegraph from a point at or near Ogden City, in "the Territory of Utah, to Salt Lake City, in said "Territory, * * * to the extent of two hundred "feet in width on each side of said railroad where "it may pass through the public domain, including all "necessary ground for station buildings, work shops,

" depots, machine shops, switches, sidetracks, turn-
" tables, and water stations: Provided, that within
" three months from the passage of this Act the said
" Utah Central Railroad Company shall file with the
" Secretary of the Interior a map to be approved by
" him, exhibiting the line of the railroad of said com-
" pany, as the same has been located and constructed."

A map showing the line as constructed was filed with the Secretary of the Interior on March 7, 1871, and approved by him [pp. 52, 53]. The one acre parcel in suit was within 200 feet of the center line of said road [p. 2, brief plaintiff-in-error].

At the time the right of way Act was enacted this parcel was within the boundaries, as fixed by the territorial legislature, of the City of Salt Lake, which had been incorporated by that legislature in 1860 [p. 15]. Also this one acre parcel as part of a larger area had been entered by one Macduff on July 21, 1869, prior to the right of way grant, as a pre-emption claim [p. 38]. It is urged by plaintiff-in-error that these facts operated to exclude this parcel from the grant of right of way to the Railroad Company.

Reference is made by plaintiff-in-error to a number of cases in which the term "public lands" has been defined as including only such lands as are subject to sale or other disposal under general laws and as excluding lands covered by homestead and pre-emption entries. In general the cases so cited involved grants, not of right of way, but of *lands* in aid of railroad construction, and such land grants contained express exceptions of

homesteads, pre-emptions, etc. The Northern Pacific land grant, for example, granted public lands "not re- "served, sold, granted or otherwise appropriated, and "free from pre-emption or other claims or rights" [13 Stats. 365, 367]. The land grants to the Union Pacific, Kansas Pacific and Central Pacific railroads were of public lands "not sold, reserved or otherwise disposed "of by the United States, and to which a pre-emption "or homestead claim may not have attached" [12 Stats. 489, 492]. No less than ten of the cases cited by plaintiff-in-error arose under these two land grants.

It has long been recognized that the railroad right of way grants differ in their terms from the *land* grants and that in other respects different considerations affect their construction. *St. Joseph & Denver City R. R. Co.* v. *Baldwin*, 103 U. S. 426. *Winona & St. Peter R. R. Co.* v. *Barney*, 113 U. S. 618, 627. *Jamestown & Northern R. R. Co.* v. *Jones*, 177 U. S. 125, 132. *Union Pacific R. R. Co.* v. *Douglas Co.*, 31 Fed. 540. It has also been recognized by this Court that the meaning of the term "public lands" as used in right of way grants is not fixed and invariable. *Kindred* v. *Union Pacific R. R. Co.*, 225 U. S. 582, 596.

There is no doubt of the *power* of Congress to grant a right of way even over lands on which pre-emption or homestead claims have been duly initiated or which have been previously reserved for some other purpose. The *power* of disposal continues until the inchoate right has ripened into complete title by issue of patent or its equivalent. *Northern Pacific R. R. Co.* v. *Smith*, 171

U. S. 260, 269. *Frisbie* v. *Whitney*, 9 Wall. 187. *The Yosemite Valley case*, 15 Wall. 77. *Buxton* v. *Traver*, 130 U. S. 232. *Northern Pacific R. R. Co.* v. *Colburn*, 164 U. S. 383.

The question in the present case, therefore, as in every right of way case, is merely a question of the construction of the particular granting act, according to its terms and in the light of its purpose and of the surrounding circumstances, to determine the intention of the legislators as to the lands to which the right of way should attach.

I.

The Utah Central right of way grant is entitled to a broad and liberal construction. It was not a license for a prospective location without defined limits but in effect a confirmation of an existing and definitely known location.

In construing a right of way Act, the intent to extend the grant beyond the usual limitations of the term "public lands" may be inferred from the context. In *Kindred* v. *Union Pacific R. R. Co.*, 225 U. S. 582, the land was at the date of the right of way grant subject by treaty to a reservation in favor of the Delaware Indians for a permanent home. By subsequent treaty the removal of the Delawares was effected. The railroad right of way was held to attach to the lands and to be superior to the title of an individual to whom the land had been patented. This conclusion was reached in part because of a provision in the right of way Act

which was deemed to justify the *inference* that Congress intended the grant to apply to Indian lands as to which Congress could properly grant a right of way, although the terms of the grant would not otherwise have been deemed applicable to an Indian reservation.

In the present case, while the granting clause was in the standard form of that period and referred to "public lands", it was employed with an unusual context and applied to an exceptional situation. The Act provided that within three months from its passage the railroad should file a map "exhibiting the line of the railroad "of said company, *as the same has been located "and constructed"*. This, then, was in effect a confirmation of the existing location of the railroad. It was not the usual case of a grant for a railroad line merely in prospect, with a roving commission to locate on any route the company might subsequently select. The right of way grant to the Utah & Northern Railroad Company [March 3, 1873, 17 Stats. 612] is an example of the usual grant of this period. It granted a right of way for a prospective line to be constructed through the territories of Utah, Idaho and Montana "by the most advantageous and practicable line", and provided that the railroad company should locate the route of said railroad and file a map of such location within *one year*. The line of the Utah Central road was a short one, the distance between Ogden and Salt Lake City being only about 37 miles. No extensive interference therefore with the claims of settlers on the public domain could be involved in this grant. The Land Department could

ascertain readily what, if any, claims or reservations existed with which the located railroad might be in conflict. Under such circumstances the conclusion is justifiable that Congress intended the right of way to attach to all land of which it retained control and power of disposal. It is a reasonable assumption that any conflicting but unperfected claims which Congress desired to protect would have been expressly excepted from the grant and not left in doubt by the general and broad terms used.

The Court may also look to the condition of the country, the history of the times and the purpose designed to be effected by the grant in ascertaining its intent. *Winona & St. Peter R. R. Co.* v. *Barney*, 113 U. S. 618, 625; *United States* v. *Union Pacific R. R. Co.*, 91 U. S. 72, 79.

The history of the period of the promotion of the Pacific railroads and the considerations inducing the extension of government aid to such railroads are well set forth and discussed in *United States* v. *Union Pacific R. R. Co.*, *supra*, at pages 79 to 81. The Utah Central grant was a somewhat later grant than the original Pacific Railroad Acts but subsidiary and incidental thereto. The railroad connection of Salt Lake with Ogden formed a link connecting the Union Pacific Railroad with Salt Lake City and its construction occurred at about the time the transcontinental line was constructed into Ogden. Salt Lake City, except for Denver, was the largest city between the Missouri river and the Pacific Coast. Fort Douglas had been estab-

lished near Salt Lake City because of local conditions deemed to require such special provision for the maintenance of the sovereignty of the federal government, and therefore the provision in the Utah Central grant for the use of the railroad for military purposes had perhaps more than the usual significance.

We refer also in this connection to the opinion of the Utah Supreme Court in *Moon* v. *Salt Lake County*, 27 Utah, 435, 76 Pac. Rep. 222, in which the court considered the question whether this same Utah Central right of way grant should be construed as stopping at the northern boundary of the municipal corporation of Salt Lake City or extending to its depot in the inhabited part of the city. In ascertaining the intent of Congress the court took into consideration the fact that Congress was aware when it made the grant that the railroad had been constructed to the depot in the city over public lands within the city limits, that Congress granted the right of way for the road *as already located and constructed*, and that the grant was not a mere gift but designed to promote the interests of the inhabitants of the cities of Salt Lake and Ogden as well as of the public at large and the general government. The court concluded that under these circumstances the grant should not be narrowly construed and that it could not reasonably be assumed that Congress intended that this railroad which was to be subject to the use of the United States for government service should stop at that boundary line although the inhabited

portion of the city was several miles distant, and the intervening land was unoccupied public land.

In *Washington & Idaho R. R. Co.* v. *Osborn*, 160 U. S. 103, cited by plaintiff-in-error, the controversy was between a railroad claiming a right of way under the general right of way Act of March 3, 1875, and a settler who had been unable to perfect or complete any pre-emption right because the land was unsurveyed. This Court held that the claims of the settler were superior to the right of way, basing the conclusion upon the provision in the 3rd section of the right of way Act for condemnation of "private lands and pos-"sessory claims on the public lands". In the Utah Central grant, however, no provision for condemnation appears. At this time there was no federal law of general application under which possessory claims on the public lands could be condemned for railroad purposes, the provision therefor in the 3rd section of the general right of way Act of 1875 being the first general provision of this character. It would seem, therefore, that the absence of all provision for condemnation, would tend strongly to the inference that Congress intended this grant to take effect as to lands subject to claims of settlers.

It is submitted that the foregoing considerations make for a liberal, rather than a narrow, construction of this grant and warrant the conclusion that it was the intention of Congress to grant the right of way over all lands which by any reasonable construction could be

included in the terms "public lands" or "public domain".

Such a construction would make this right of way superior even to rights which had been legally initiated under the land laws but which remained inchoate, *e. g.*, homestead and pre-emption entries. These inchoate rights are merely unexecuted *offers* or *promises* of a grant to be earned by performance of certain prescribed conditions; while a right of way Act, like that in favor of the Utah Central, is a present, complete and executed grant. We do not, however, consider it essential to an affirmance of the judgment in this case that so broad a construction of the right of way Act be adopted. It is believed that the claims and considerations advanced by the plaintiff-in-error fall far short of those which have been adjudged sufficient to defeat the usual and general right of way grants, and that, without invoking an unusually liberal rule of interpretation for this particular grant, it must be sustained against claims of the character here interposed to defeat it.

2.

The attempted pre-emption entry by Macduff was void because of the express statutory prohibition of pre-emption entries within the limits of incorporated cities, and Macduff therefore had no inchoate right or equity or governmental promise in his favor.

The pre-emption law at the time of the Macduff entry of 1869 was the Act of September 4, 1841, Sec-

tion 10, [5 Stats. 455], which contained the following provisions (which afterwards in substance became Section 2258 R. S.):

"No lands included in any reservation, by any "treaty, law, or proclamation of the President of the "United States, or reserved for salines, or for other "purposes; no lands reserved for the support of "schools * * * *no sections or fractions of sections "included within the limits of any incorporated town;* "no portions of the public lands which have been "selected as the site for a city or town; no parcel or "lot of land actually settled and occupied for the pur- "poses of trade and not agriculture; and no lands on "which are situated any known salines or mines, shall "be liable to entry under and by virtue of the pro- "visions of this Act."

The land entered by Macduff was at the time of his entry within the corporate limits of Salt Lake City [p. 15]. That under this statutory prohibition such an attempted pre-emption entry was absolutely void has been decided by this court in *Burfenning* v. *Chicago, etc., Ry. Co.*, 163 U. S. 321, affirming 46 Minn. 20, and by other courts in *Root* v. *Shields*, 1 Woolworth, 34 (decided by Mr. Justice Miller of this court) and *Houlton* v. *Chicago, etc., Ry. Co.*, 86 Wisconsin, 59, holding invalid under the provisions of Section 2258, R. S., pre-emption and homestead entries attempted within the corporate limits of Minneapolis, Omaha and Superior respectively. Payment was not made by

Macduff to secure his final receipt until the early part of the year 1871 [pp. 38, 39], and patent was not issued to him until June 6, 1871, [p. 39], both being subsequent to the right of way Act. But in any event the patent issued upon this void entry would have no validity as shown by the cases above cited.

It is apparently not contended by the plaintiff in-error that the Macduff entry was valid when made [see Record, p. 22, and brief for plaintiff-in-error]. But the Macduff entry and patent are claimed to have been validated by the Act of March 3, 1877 (19 Stats. 392). This Act was passed to remedy the evil which had arisen through the incorporation by state and territorial legislatures of towns and cities with unduly great areas included within the corporate limits, since by virtue of the prohibition in the pre-emption law such surplus areas, no matter how greatly in excess of the area which the town could select under the townsite laws, was not open to pre-emption or homestead entry. *Alger* v. *Hill*, 2 Washington, 344; *Vilas* v. *Algar*, 109 Fed. 519. This Act provided machinery by which the Land Department could compel the city to make its selection under the townsite law, or in the absence of such selection could prescribe the limits of the area allowed for city purposes, and thereupon open the surplus area to agricultural entry. It provided also that entries theretofore allowed upon lands within the city limits might, under certain restrictions, be confirmed and carried into patent.

The confirmatory Act of 1877, however, could give

no validity to the void pre-emption and patent as to the one acre in suit if during their invalidity a right of way thereover vested in the Utah Central Railroad Company. No such effect has been claimed for the Act of 1877 by the plaintiff-in-error, but its effort has been merely to establish that the right of way did not attach to this parcel at all. Macduff would nevertheless have the benefit of the Act of 1877 as to the remaining 166 acres of his entry and presumably also as to whatever reversionary interest existed in the acre in suit after satisfying the railroad right of way.

Plaintiff-in error points out that the *Burfenning* case, *supra*, did not consider the confirmatory Act of 1877. This is quite true. But we think that the reason therefor is not the reason advanced on page 16 of the brief for plaintiff-in-error, but simply the fact that the confirmatory act was never invoked by Burfenning, possibly because he was unable to bring himself within its restrictions. However this may be, the authority of *Burfenning* case stands unimpaired as to the point for which we cite it, namely, that a pre-emption entry within the limits of an incorporated city is void.

The pre-emption entry being void when made and so continuing at the time of the right of way grant, no right, claim or equity of any sort existed in connection with it which could be deemed to prevent the attaching of the right of way.

Only three right of way cases are cited by plaintiff-in-error as in his favor, to wit, *Washington & Idaho R. R. Co.* v. *Osborn*, 160 U. S. 103; *Union Pacific R. R.*

Co. v. *Harris*, 215 U. S. 386, and *Kindred* v. *Union Pacific R. R. Co.*, 225 U. S. 582.

The *Kindred* case is cited only for its recognition of the usual meaning of the term "public lands". We have referred to that case under the preceding subhead. In it this Court held that the right of way grant attached to lands which had been at the date of the grant permanently reserved for Indian occupation.

In the *Osborn* case, to which also we have referred under the preceding subhead, the right of way was held not to attach to unsurveyed public land claimed by a *bona fide* settler, although no technical entry under the pre-emption or homestead laws had been made. But in that case the settler was a lawful occupant and had done everything to perfect his settlement which could be done while the land remained unsurveyed. The land was agricultural in character and not reserved from sale. The settler resided on his claim and had erected substantial improvements and had filed in the county recorder's office of the territory his declaration of intention to pre-empt the land as soon as surveyed. The pre-emption law of September 4, 1841 [5 Stats. 455] applied only to surveyed public lands but some of the early pre-emption laws expressly applied to unsurveyed as well as surveyed lands [see statement of the case in *Yosemite Valley case*, 15 Wall. 77]. At the time of the settlement involved in the *Osborn* case the pre-emption law found in the revised statutes was in force and seems to have expressly recognized the right to settle upon the unsurveyed lands with a view to

pre-emption, for it was provided in Section 2266, R. S. that: "In regard to settlements which are authorized "upon unsurveyed lands, the pre-emption claimant "shall be in all cases required to file his declaratory "statement within three months from the date of the "receipt at the district land office of the approved plat "of the township embracing such pre-emption settle-"ment." At any rate the opinion of this court in the *Osborn* case [160 U. S. at pp. 108 and 109] recognized that the settler on unsurveyed lands occupied under permission of the government and had a preferential right to pre-empt his claim when surveyed.

In the *Harris* case the right of way was held not to attach to land covered by homestead entry, but the homestead there involved had been duly initiated pursuant to the land laws prior to the date when the right of way claimed could have attached.

The Macduff entry is clearly not entitled to the consideration extended in the *Harris* case to a duly initiated, although inchoate, homestead entry, or to the consideration given in the *Osborn* case to a *bona fide* settlement and occupation under legal sanction with preferential right to make legal entry as soon as the lands should be surveyed. Macduff was not merely proceeding in the absence of any statutory authority, but was proceeding in direct defiance of a statutory prohibition. All the cases upholding the claims of settlers against railroad right of way, or even land grant, claims are decided upon the basis of something in the nature of an offer or promise of the government to the settler

or an equity acquired by the settler, which, if equitable motives are attributed to the government, it cannot be *assumed* that Congress intended to destroy, and which therefore will not be adjudged destroyed by or subjected to a subsequent grant unless an intention to that effect is expressed or fairly implied. But we submit with confidence that a pre-emption entry in a locality where such entries are expressly prohibited by statute attracts to itself no equity and creates for itself no governmental offer or promise, which can be invoked against one upon whom the government has expressly conferred rights over the public lands. There are not in such a case two beneficiaries of the government whose rights conflict and cannot both be given effect; there is only one party, the Utah Central Railroad in this instance, whom the government has attempted or intended to benefit.

3.

Lands within the limits of incorporated cities were not, by reason of such location, reserved or withdrawn from the public domain. There was no floating grant, or other grant, offer, promise or equity of any kind in favor of the City of Salt Lake as to the parcel in suit.

Plaintiff-in-error deraigns no title through the City of Salt Lake. The city had not entered this one acre parcel in 1870 and never did enter it [pp. 11, 26], and, as far as appears, never attempted to exercise any

control over it. But plaintiff-in-error, nevertheless seeks to defeat the attaching of the right of way grant on two grounds, *first*, that because the parcel was within the corporate limits of the city as fixed by the legislature it was not "public land", and, *second*, that there was a floating grant to the city of some smaller area within the city limits which constituted a right or equity of the city for the benefit of its inhabitants.

The statutes did not reserve to an incorporated town or city upon the public lands the right of selection of all the public lands within the corporate boundaries. The fixing of corporate boundaries of a town or city was an act of the territorial or state legislature and a matter over which the public land laws exercised no control. The land laws (townsite law of March 2, 1867, 14 Stats. 541; afterwards Secs. 2387 to 2389 R. S.) provided that where any part of the public lands were *occupied as a townsite*, the city authorities, in case such town was incorporated, might enter the land *actually occupied* by the town, in trust, for the several use and benefit of the occupants thereof, the lots to be disposed of at the minimum price under regulations of the state or territory. But the area which might so be selected was limited according to the population, with a maximum of 2560 acres (4 square miles) in case the inhabitants were 5000 or more. A special statute was added for the benefit of Salt Lake City by Act of July 1, 1870 [16 Stats. 183, afterwards 2390 R. S.], which permitted Salt Lake City to select for a population of

15,000, on which basis its maximum entry would be 5760 acres (9 square miles). The selection by the Salt Lake City was made November 21, 1871, and covered 5730.45 acres, or substantially the maximum allowed [pp. 11, 26]. It does not appear in the record what the total area included within the corporate boundaries was, but that it was more than the law, even as amended, in 1870, permitted that city to select is shown by the facts that the land in controversy was within the city limits [p. 15] but was not within the area selected by the city [pp. 11, 26], and that this land was a part of Section 23, township 1 north, range 1 west [Complaint, p. 2; Abstract, p. 37 *et seq.*], which section [a square mile or 640 acres] was not included at all in the city's selection [p. 26].

There is not found in the townsite laws or any other statutes any *reservation* of land in favor of a *prospective* townsite entry. The existence of city boundaries fixed by the territorial legislature did not create a reservation or withdrawal of the land from the public domain, and no such withdrawal occurred prior to entry made by the city authorities in the land office.

The prohibition by Section 2258 R. S. (Act of 1841) of pre-emption entries within the limits of incorporated cities it is true operated to prevent all entry of the land *for agricultural purposes*, since under Section 2289 R. S. homestead entries were permitted only upon land subject to pre-emption. But this is a very different thing from an entire reservation or withdrawal of land from the public domain. It left it still

open to disposal under the townsite laws, which were general land laws. It left it open also to location of mining claims under the general laws. The recognition of legislative boundaries in the pre-emption law operated to give the city a preference in the right of selection over homesteaders and pre-emptioners, but over no others. But this preference was merely the result of the prohibition directed against the agricultural entries specifically, not because of any grant or promise or equity extended to the projectors or incorporators of a townsite or city.

In the case of Salt Lake City, as in the case of many other cities, the corporate limits were fixed so generously by the territorial legislature that they comprehended more than the maximum acreage which the land laws permitted to be taken for townsite purposes. It cannot be said that there was any promise given or equity created in favor of Salt Lake City as to 10,000 acres, or 6000 acres, or whatever was the total area within the city limits, when the Act of July 1, 1870, expressly fixed the maximum which might be selected by that city at 5760 acres. There was no inchoate right of any kind or any equity in favor of the city as to any acreage outside its maximum of 5760 acres. That this matter of incorporated city limits affected only possible agricultural entries is emphasized by the remedial legislation, already mentioned, enacted in 1877 [19 Stats. 392], which quite appropriately limited its relief to pre-emptioners and homesteaders.

In the case of *Northern Pacific* v. *Smith*, 171 U. S.

260, there was involved a conflict between the railroad right of way granted to the Northern Pacific by Act of July 2, 1864 [13 Stats. 365] and a title claim by an individual to certain lots in the City of Bismarck, North Dakota. A map had been filed at an early date by the railroad, but, as its route did not cross the tract in question, the right of way of the railroad depended upon its actual construction across this tract, which occurred in 1873. No townsite patent had been issued until 1879, in which year patent issued on an entry (the date of which was not disclosed by the record) made by the Mayor of the City of Bismarck. As early as 1872 a land company had occupied an 80-acre tract. including the land in controversy as the site of a town, and sold lots therein according to a plat prepared by the land company. This plat was filed in 1874, and was later adopted by the City of Bismarck. The question, therefore, was whether the right of way attached upon the construction of the road in 1873, notwithstanding an existing occupation and selection for a townsite. This Court sustained the right of way, and said [pp. 269, 270]:

"If, then, one seeking to appropriate to himself a "portion of the public lands cannot, no matter how "long his occupation or how large his improvements, "maintain a right of possession against the United "States or their grantees, unless he has, by entry and "payment of purchase money, created in himself a "vested right, is one who claims under a townsite

" grant in any better position? No cases are cited to
" that effect; nor does there seem to be any reason, in
" the nature of things, why rights created under a
" townsite settlement should be carried back, by opera-
" tion of law, so as to defeat the title of a party who
" had, under color of right, taken possession and made
" valuable improvements before the entry under the
" townsite act."

It is true that there is nothing in the *Smith* case concerning the limits of an incorporated city, but the existence of city boundaries fixed by state or territorial legislation as we have heretofore argued is immaterial to this question. In the present case the authorities of Salt Lake City possessed at the time of the Utah Central right of way grant an *opportunity* to enter this land as a part of its selection for townsite purposes, but they had no greater or different opportunity in the legal sense to make such selection than any settlers or locators of an unincorporated town possessed to enter for townsite purposes any public lands not already appropriated. In the present case it appears that the parcel in suit was not occupied for any purposes of trade or business and that there was no business or buildings within a half mile of this location, and that the entry and selection when made by the city authorities in 1871 did not include any part of Section 23 of which this parcel was a part [pp. 14, 26]. The same pre-emption law existed at the time of the Northern Pacific construction in 1873 as at the time of the Utah Central

grant (Act of September 4, 1841, 5 Stats. 455), and excluded from pre-exemption lands "within the limits of "any incorporated town" or "*selected as the site for a* "*city or town*".

If the prospective townsite and the acts of occupation and appropriation in contemplation thereof in the *Smith* case constituted no legal obstacle to the attaching of the Northern Pacific right of way grant, it seems a necessary conclusion that the mere existence of an opportunity on the part of the city of Salt Lake, unavailed of for several years, to enter the parcel here in suit as a part of its townsite did not preclude the attaching of the Utah Central right of way grant.

Another case worthy of note in this connection is *United States* v. *McLaughlin*, 127 U. S. 428. This case involved a conflict between the Central Pacific *land* grant and an alleged Mexican grant, claim for which existed prior to the date of the railroad grant. By virtue of treaties with Mexico all private rights acquired in California under Mexican grants were respected, and all lands so claimed were withdrawn from the operation of the United States public land laws. The Mexican grant was claimed to be for 11 square leagues of land within an area of 50 square leagues if not more. Certain of the lands within the Central Pacific grant were located within the exterior limits of the Mexican grant as claimed. The Mexican claim was finally rejected as fraudulent by this Court in 1865, but such rejection did not give any validity to the Central Pacific grant which it did not previously

possess. It was held by this Court that, inasmuch as the grant claimed amounted to only 11 square leagues, only this amount could be considered as withdrawn and reserved from the public lands, and that any surplus within the exterior limits remained public land even within the meaning of the Central Pacific land grant which as hereinbefore shown contained broad express exceptions. It was held that the government's power of disposal within the exterior limits was not suspended but that it might make grants to others within the exterior limits provided enough was left within the exterior limits to satisfy the prior grant.

This claim involved in the *McLaughlin* case was the same Mexican "grant" involved in *Newhall* v. *Sanger*, 92 U. S. 761, cited and much relied upon by plaintiff-in-error. But examining, in the *McLaughlin* case, the record in *Newhall* v. *Sanger* this Court pointed out that in that case the claim had not been made and the record did not show that this Mexican grant was a floating grant within greater exterior limits, and that accordingly the decision of the earlier case had been based upon the theory that no disposition of land within the exterior limits could be made without diminishing the extent of the Mexican grant. It was said [p. 455] that while the reasoning in *Newhall* v. *Sanger* was entirely conclusive as to all definite grants which identified the land granted it was not fairly applicable to floats, and finally [p. 456]:

"As we have already seen, there can be no doubt "that a grant made by Congress within the limits of a

" territory subject to a Mexican float, would take pre-
" cedence of the float if sufficient land remained to
" satisfy it. The only question is, whether the surplus
" land so at the disposal of Congress may be regarded
" as public land within the meaning of the railroad aid
" grants. We are disposed to think that it may be, and
" that as to grants of this character, floating grants as
" they may be called, the railroad aid grants are not
" deprived of effect provided a sufficient quantity lying
" together be left to satisfy the grant".

Plaintiff-in-error quotes also from *Doolan* v. *Carr*, 125 U. S. 618, a case which followed *Newhall* v. *Sanger* and was understood to hold that all Mexican grants were superior to the railroad land grants. In *Carr* v. *Quigley*, 149 U. S. 652, this Court discussed *Doolan* v. *Carr* and overruled it as the law applicable to floats. The quotation on page 11 of the brief of plaintiff-in-error from *Doolan* v. *Carr*, therefore, does not correctly state the final views expressed by this Court upon the subject.

In the *McLaughlin* case there was, in principle and for the purposes of that case, an actual *grant* of the definite amount of 11 leagues to be located within certain exterior boundaries. In the case of Salt Lake City there was at the time of the Utah Central right of way Act no pretence of a grant to the city authorities but a mere *opportunity* to select for the location of the city a maximum of 5760 acres within certain exterior boundaries of greater extent. But the *McLaughlin*

case would seem conclusive that even if there had been an actual grant to Salt Lake City of 5760 acres to be located anywhere within the city limits, the surplus area even before such location could not be deemed reserved from the public domain or excluded from such a grant as that in favor of the Utah Central Railroad Company.

Plaintiff-in-error refers to the provision of the townsite law to the effect that the entry by the Mayor is "in "trust for the several use and benefit of the occupants "thereof, according to their respective interests". On this provision it is faintly suggested that Macduff or any other occupant of land that might be entered by the Mayor had an equitable interest therein. But Section 2387, R. S., permits the Mayor to enter only public lands "settled upon and occupied as a townsite". Section 2388 emphasizes this limitation by a provision that the declaratory statement filed by the Mayor "shall include only such land as is actually occupied by "the town". Not only was the land entered by Macduff never included in the townsite entry, but it could not have been for it was not actually occupied as a part of the prospective townsite. Plaintiff-in-error itself introduced testimony that there had never been any business, house, store or shops or anything of that kind within half a mile of this parcel [p. 14]. Whether or not the equity existing under the townsite law in favor of an occupant of the townsite and a member of the community forming the town would be superior to a right of way grant, it is clear that there is no basis

for a claim of any such equity in favor of Macduff's entry which could be deemed to take the land so entered out of the category of public land and preclude the attaching of the right of way grant thereto.

CONCLUSION.

The writ or error should be dismissed or the judgment of the Utah Supreme Court affirmed.

HENRY W. CLARK,
GEORGE H. SMITH,
H. B. THOMPSON.

UTAH CENTRAL RIGHT OF WAY ACT.

Act of December 15, 1870 (16 Stats. 395).

An Act granting to the Utah Central Railroad Company a Right of Way through the public Lands for the Construction of a Railroad and Telegraph.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands be, and the same is hereby, granted to the Utah Central Railroad Company, a corporation created under the laws of the legislative assembly of the Territory of Utah, its successors and assigns, for the construction of a railroad and telegraph from a point at or near Ogden City, in the Territory of Utah, to Salt Lake City, in said Territory; and the right, power, and authority *is* (are) hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station-buildings, work-shops, depots, machine-shops, switches, side-tracks, turn-tables, and water-stations: *Provided,* That within three months from the passage of this act the said Utah Central Railroad Company shall file with the Secretary of the Interior a map to be approved by

him, exhibiting the line of the railroad of said company, as the same has been located and constructed: *Provided further*, That said company shall not charge the government higher rates than they do individuals for like transportation and telegraphic service. And it shall be the duty of the Utah Central Railroad Company to permit any other railroad, which has been or shall be authorized to be built by the United States, or by the legislature of the Territory of Utah, to form running connections with its road on fair and equitable terms.

SEC. 2. *And be it further enacted*, That the United States make the grants herein, and that the said Utah Central Railroad Company accepts the same, upon the express condition that the said company shall not exercise the power given by section ten of chapter sixteen of the laws of the Territory of Utah, approved February nineteenth, eighteen hundred and sixty-nine; and upon the further express condition that if the said company make any breach of the conditions hereof, then in such case, at any time hereafter, the United States, by its Congress, may do any and all acts and things which may be needful and necessary for the enforcement of such conditions.

SEC. 3. *And be it further enacted*, That said Utah Central Railroad shall be a post route and a military road, subject to the use of the United States for postal, military, naval, and all other government serv-

ice, and also subject to such regulations as Congress may impose, restricting the charges for such government transportation.

SEC. 4. *And be it further enacted*, That the acceptance of the terms, conditions, and impositions of this act, by the said Utah Central Railroad Company, shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within three months after the passage of this act, and shall be served on the President of the United States; and if such acceptance and service shall not be so made, this grant shall be void.

SEC. 5. *And be it further enacted*, That Congress may at any time, having due regard for the rights of said Utah Central Railroad Company, add to, alter, amend, or repeal this act.

APPROVED, December 15, 1870.

SALT LAKE INVESTMENT COMPANY *v.* OREGON SHORT LINE RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 29. Argued March 8, 1918.—Decided April 15, 1918.

Lands within the limits of an incorporated city, whether actually occupied or sought to be entered as a townsite or not, were excluded from acquisition under the Pre-emption Act.

An attempted pre-emption settlement on such land, and filing of declaratory statement in the local land office, do not affect the disposing power of Congress or operate to exclude the tract from subsequent grant of right of way "through the public lands," containing no excepting clause.

The Act of March 3, 1877, c. 113, 19 Stat. 392, did not confirm or provide for confirming such absolutely void pre-emption claims so as to disturb rights vested before the date of the act under a railroad right of way grant.

The act granting a right of way "through the public lands" to the Utah Central Railroad Company (c. 2, 16 Stat. 395,) applied to public lands over which the road had been constructed within the corporate limits of Salt Lake City but which never were occupied as a townsite or attempted to be entered as such. The Townsite Act is not inconsistent with this conclusion.

46 Utah, 203, affirmed.

THE case is stated in the opinion.

Mr. W. H. King, with whom *Mr. M. E. Wilson* and *Mr. E. A. Walton* were on the briefs, for plaintiff in error.

Mr. Henry W. Clark, with whom *Mr. George H. Smith* and *Mr. H. B. Thompson* were on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

A small parcel of land in Utah is here the subject of conflicting claims—one under a patent to Malcolm Mac-

duff issued under the pre-emption act, c. 16, 5 Stat. 453, and the other under an act, c. 2, 16 Stat. 395, granting a right of way "through the public lands" to the Utah Central Railroad Company. The court below sustained the latter claim, 46 Utah, 203, and the case is here on a writ of error allowed before the Act of September 6, 1916, c. 448, 39 Stat. 726, became effective.

Macduff's pre-emption claim was initiated by settlement June 10, 1869; his declaratory statement was filed in the local land office July 21 of that year; he paid the purchase price and secured an entry January 19, 1871, and the patent was issued June 6, 1871.

The right of way was granted December 15, 1870. At that time the railroad was completed and in operation for its full length. Cong. Globe, 41st Cong., 2d sess., 4512, 5635; *Moon* v. *Salt Lake County*, 27 Utah, 435, 442. It was constructed late in 1869 or early in 1870, after Macduff filed his declaratory statement and before he paid the purchase price or secured his entry.

Continuously after 1860 the tract sought to be pre-empted was within the corporate limits of Salt Lake City, as defined by a public statute, but was never actually occupied as a town site nor attempted to be entered as such. The parcel in controversy is within that tract, is also within the exterior lines of the right of way, and is occupied and used for right of way purposes.

The plaintiff in error is the successor in interest and title of Macduff and the defendent in error is the like successor of the Utah Central Railroad Company.

The pre-emption act, § 10, excluded from acquisition thereunder all lands "within the limits of any incorporated town." Thus the land which Macduff sought to pre-empt was not subject to pre-emption, and could no more be entered or acquired in that way than if it were in an Indian or military reservation. See *Wilcox* v. *Jackson*, 13 Pet. 498, 511. That it was not actually occupied as a

town site, nor sought to be entered as such, is immaterial. As Mr. Justice Miller pointed out in *Root* v. *Shields*, 20 Fed. Cas. 1160, 1166, Congress did not confine the exclusion to such lands as were so occupied, or such as were subject to town site entry, but "deemed the short way the best way,—to exclude them all from the operation of the act by a general rule." In that case the learned justice held a pre-emption entry of land within the corporate limits of Omaha "illegal and void," and said in that connection: "Again, the defect in the title was a legal defect; it was a radical defect. It was as if no entry had ever been made. By it Shields did not take even an equity. After he had gone through the process of making the entry, after he received the patent certificate, Shields had no more right, or title, or interest in the land than he had before. And as he had none, he could convey no interest in the land. By the deed which he made, and by the successive deeds which they received, his grantees took no more than he had, which was nothing at all."

In the case of *Burfenning* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 163 U. S. 321, a plaintiff in ejectment relied on a patent issued under the homestead law, which adopted the excluding provision of the pre-emption act, and his title was challenged on the ground that the entry and patent were for land within the corporate limits of Minneapolis. This court observing, first, that the record affirmatively disclosed that the land was in the city limits when the claim was initiated, and second, that the case was not one where a finding by the Land Department on a question of fact resting on parol evidence was sought to be drawn in question, held the patent void under the general rule that "when by act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a

patent, transfer no title, and may be challenged in an action at law."

Applying these views, we think Macduff's settlement and declaratory statement under the pre-emption act were of no effect. They neither conferred any right on him nor took any from the Government. His claim was not merely irregular or imperfect, but was an impossible one under the law, and so the status of the land was not affected thereby. The land continued to be subject to the disposal of Congress and came within the terms of the right of way act as much as if he were making no claim to it. Of course, the presence on public land of a mere squatter does not except it from the operation of such an act containing, as here, no excepting clause.

It is said that by the Act of March 3, 1877, c. 113, 19 Stat. 392, Congress confirmed or provided for the confirmation of pre-emption claims such as this. Assuming, without so deciding, that the act is susceptible of this interpretation, we think it does not disturb rights which were conferred and became vested under the right of way act more than six years before.

It seems also to be thought that the town site law in some way prevented the right of way act from reaching public land within the city limits, but on examining both statutes we are persuaded there is no basis for so thinking. Certainly it was not intended that the right of way should stop at the city limits, and, as the town site law interposed no obstacle, we think the right of way act was intended to and did apply to the public land lying inside those limits over which the railroad had been constructed.

Judgment affirmed.